No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AARON LEE JONES,

Petitioner,

—v.—

DONAL CAMPBELL, Commissioner, Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

VINCENT R. FITZPATRICK, JR.
Counsel of Record
HEATHER K. MCDEVITT
STEPHANIE COHEN
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

Attorneys for Petitioner

Capital Case
Questions Presented

Questions related to counsel's ineffective assistance at capital sentencing:

1. Is habeas relief warranted under *Strickland* where a state court finding that counsel provided constitutionally adequate representation is based on speculation about counsel unsupported by the record, even though the record includes counsel's testimony at post-conviction proceedings?

2. Is habeas relief warranted under *Strickland* where counsel fails to investigate thoroughly and presents *no* mitigating evidence at capital sentencing, despite the presence of evidence of mental illness, low intelligence, an abusive childhood, history of substance abuse, intoxication to the point of toxic psychosis on the night of the crime, and other mitigating factors, even though counsel had ample evidence available at the time of trial?

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Petitioner Aaron Lee Jones respectfully prays that this Court issue a writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit denying habeas corpus relief in this capital case.

Opinions Below

The Eleventh Circuit decision is reported at *Jones v. Campbell*, 436 F.3d 1285 (11th Cir. 2006) (App. 1a-36a).[1] The Eleventh Circuit's denial of Mr. Jones' petition for rehearing and rehearing *en banc* (App. 284a-285a) and the lower court decision of the United States District Court for the Northern District of Alabama (App. 37a-183a) are unreported. Because this is a habeas corpus petition by a prisoner in state custody, Petitioner has appended the unreported decision of the Blount County Circuit Court denying Petitioner's collateral challenge to his conviction and death sentence (App. 184a-216a), as well as the decision of the Alabama Court of Criminal Appeals affirming the Blount County Circuit Court's decision, reported at *Jones v. State*, 753 So. 2d 1174 (Ala. Crim. App. 1999) (App. 217a-283a).

Statement of Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Eleventh Circuit affirmed the state courts' denial of habeas relief on January 20, 2006 and denied rehearing *en banc* on March 23, 2006. This Court granted Petitioner an extension of time until July 21, 2006 in which to file this petition for a writ of certiorari (App. 287a). This petition is timely filed.

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[1] "App." refers to the appendix hereto.

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

28 U.S.C. § 2254(d) is reproduced at App. 286a.

Statement of the Case

I. Procedural History

Aaron Lee Jones was convicted of capital murder and sentenced to death in 1979 in connection with the deaths of Carl and Willene Nelson. In 1981, the Alabama Court of Criminal Appeals overturned Mr. Jones' conviction on the authority of *Beck v. Alabama*, 447 U.S. 625 (1980) and *Ritter v. State*, 403 So. 2d 154 (Ala. 1981).

Mr. Jones was retried in the Blount County Circuit Court and found guilty of capital murder on December 10, 1982. At sentencing, counsel for Mr. Jones presented no evidence other than to try to have Mr. Jones explain a prior felony conviction. Counsel presented no mitigation evidence. The jury recommended, and the judge imposed, a sentence of death by electrocution.

On appeal, the Alabama Court of Criminal Appeals affirmed Mr. Jones' conviction but remanded with instructions to extend the sentencing order for written findings on mitigating circumstances. The Blount County Circuit Court briefly extended its sentencing order, found no mitigating circumstances and reaffirmed its earlier death sentence. On return to remand, the Alabama Court of Criminal Appeals affirmed the conviction and sentence. The Supreme Court of Alabama

also affirmed the conviction and sentence. This Court denied a petition for a writ of certiorari.

On March 6, 1990, Mr. Jones filed a collateral petition challenging his conviction and death sentence in state court pursuant to Alabama Rule of Criminal Procedure 32 ("Rule 32"). After an amendment to Mr. Jones' Rule 32 Petition, an evidentiary hearing was held before the Blount County Circuit Court (the "Rule 32 Court") on November 13-14, 1995 (the "Rule 32 Hearing"). The Rule 32 petition was denied in its entirety on June 10, 1996 (App. 184a-216a).

In denying the petition, the Rule 32 Court adopted a 30-page narrative opinion, replete with inferential reasoning and speculation and containing many factual findings, written by the State of Alabama (the "State") (*compare* C. 1039-1069 and C. Supp. 2d 375-416).

Mr. Jones appealed the denial of state post-conviction relief to the Alabama Court of Criminal Appeals. On April 30, 1999, the Court of Criminal Appeals affirmed (App. 217a-283a), and subsequently denied a petition for rehearing. The Alabama Supreme Court denied Mr. Jones' petition for a writ of certiorari on December 17, 1999.

On December 15, 2000, pursuant to 28 U.S.C. § 2254, Mr. Jones filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama, and a motion for an evidentiary hearing. The District Court denied Mr. Jones' habeas petition and hearing request on February 6, 2004 (App. 37a-183a).

Mr. Jones appealed the denial of habeas relief to the Eleventh Circuit. On January 20, 2006, in an opinion that adopted verbatim large swaths of the Rule 32 Court's opinion, the Eleventh Circuit affirmed the District Court's judgment denying Mr. Jones habeas relief

(App. 7a-36a). The Eleventh Circuit, without addressing or even citing this Court's decisions in *Rompilla v. Beard*, 125 S. Ct. 2456 (2005) and *Wiggins v. Smith*, 539 U.S. 510 (2003), and referring to *Williams v. Taylor*, 529 U.S. 362 (2000) only on a procedural issue, denied Mr. Jones' petition for rehearing and rehearing *en banc* on March 23, 2006 (App. 284a-285a).

II. Counsel's Ineffective Assistance at Mr. Jones' 1982 Sentencing

At his retrial in December 1982, Mr. Jones was represented by lead counsel George Boles, assisted by Jack Davis, now (and at the time of the Rule 32 Hearing) deceased (App. 297a). They provided constitutionally ineffective assistance.

At the Rule 32 Hearing, Boles testified that he made all the decisions concerning trial strategy and evidentiary issues (App. 292a-293a). Boles, a transportation lawyer, had never tried a capital case and was appointed to do so the day Mr. Jones' six-day trial began (App. 288a-289a, 291a, 299a-300a). He undertook, at best, an incomplete and cursory review of the file over the course of the trial (App. 289a-290a). The State elicited no testimony from Boles that he undertook any mitigation investigation. Boles never interviewed or met with Mr. Jones. He only encountered Mr. Jones in a few brief exchanges during the trial, and, even then, Mr. Jones was, according to Boles, "not very communicative" (App. 299a-300a). Boles never met with members of Mr. Jones' family (R. 34-5, 51, Vol. 1; R. 206-07, 222, 239, 254-55, 280-81, Vol. 2; C. 1580-81).[2] He did not inter-

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[2] References to the record of the Rule 32 Hearing are denoted by "R. __, Vol. __." "C. __," "C. Supp. __" and "C. Supp. 2d __" refer, respectively, to the Clerk's Record, the Supplemental Record and the Second Supplemental Record therein. "1979 Trial Tr." refers to the 1979 trial transcript.

view a single witness (App. 292a). Boles characterized his knowledge of the case as a "general impression of what was going on" that was "[b]etter than somebody walking in off the street" (App. 292a). He testified that he did not believe that he had an obligation to try to avoid a conviction of his client or the imposition of the death penalty (App. 300a-301a).

Davis had some familiarity with the case because he was co-counsel in the 1979 trial, but he, too, did little or no preparation for either trial (R. 396-400, Vol. 2). Davis was retained two days before the 1979 trial began and he had never tried a capital case. (1979 Tr. 230; R. 19-A, Vol. 3). At the 1982 trial, Davis looked to Boles for guidance, as a supervising attorney (App. 292a-293a). There is no indication in Davis' files, or elsewhere in the record, that he conducted a reasonable investigation under this Court's precedents (R. 396, Vol. 2). This is confirmed by the fact that Boles could not identify any information discovered by Davis from any supposed investigation other than that Mr. Jones' family was estranged. Six of Mr. Jones' family members testified they were not (App. 296a-298a; R. 35, 51, Vol. 1; R. 207, 222, 239, 281, Vol. 2).

Mr. Jones' one-day sentencing hearing commenced the morning after the guilt phase concluded (C. 704). Counsel for Mr. Jones presented no evidence other than to have Mr. Jones explain a prior felony conviction (App. 295a; C. 728-734). The jury recommended the death penalty. With no mitigating evidence presented, the trial court concluded that there were no mitigating circumstances to weigh against the aggravating circumstances presented by the State and sentenced Mr. Jones to death.

Yet substantial mitigation evidence was available to counsel at the time of trial. By virtue, in part, of a 1979 mental health evaluation by the State Lunacy Commis-

sion that was part of the 1979 trial record (App. 302a-304a), counsel was either aware of this evidence at the time or aware of red flags that would have led them to it were they to have made even the slightest effort or conducted even the most cursory investigation. Had counsel conducted a reasonable investigation, counsel would have discovered substantial mitigating evidence that would have established the existence of three statutory mitigating factors and negated two of the aggravating factors argued by the State.

Specifically, at the Rule 32 Hearing, post-conviction counsel presented evidence that:

- Mr. Jones suffers from paranoid schizophrenia, a chronic, biochemical brain disorder that likely had its onset in early adolescence and pre-dated the crime (C. Supp. 615; R. 363, Vol. 2);
- Mr. Jones has an IQ of 84 (*i.e.* borderline intelligence) (App. 313a, 321a);
- Mr. Jones' mother abandoned him when he was two years old (R. 26, Vol. 1);
- Mr. Jones' father brutally abused him physically and mentally until he was about 10 years old. His father would strip him naked to a doorknob and beat him with an extension cord to the point that he had to pick bits of wire out of his flesh (App. 305a, 313a; R. 21, 30, 186-89, Vol. 1);
- Mr. Jones regularly witnessed his father sexually molest his sister (R. 190-91, Vol. 1);
- Mr. Jones was shuttled from place to place throughout his childhood, with other family members continuing the abuse after his father died (R. 191-92, Vol. 1);

- On the night of the crime, Mr. Jones was so intoxicated from consuming drugs and alcohol that he also suffered from a condition known as 'toxic psychosis' (App. 319a; R. 202-03, Vol. 2; C. Supp. 617);
- Mr. Jones has a history of drug and alcohol abuse (App. 302a, 306a, 308a, 310a);
- Mr. Jones was easily led, and his actions were the result of pressure from his co-accused (App. 317a);
- Mr. Jones had a history of steady employment (R. 397, Vol. 2; R. 404-07, 39-A, Vol. 3);
- On several occasions, Mr. Jones had attempted to join the Armed Forces (R. 404-05, Vol. 3);
- Mr. Jones received a commendation from the State Parole Board referring to Mr. Jones as a "model prisoner" (R. 401, Vol. 3);
- Mr. Jones cooperated with the police in the criminal investigation (R. 427-28, Vol. 3);
- Mr. Jones expressed remorse for the crime (App. 309a); and
- Various prison physicians (including two psychiatrists) have diagnosed Mr. Jones as psychotic for years and have treated him with psychotropic medications (R. 314-15, Vol. 2; C. Supp. 25-26, 119-21, 614-16; C. 1130-34, 1141-49, 1259-1313).

All of the evidence but the last (which is confirmatory) was available upon investigation at the time of the 1982 trial. The State presented no contrary evidence at the Rule 32 Hearing in rebuttal. Despite lengthy questioning by the State and counsel for Petitioner, Boles never testified that his failure to investigate or present mitigating evidence was "strategic," "tactical" or an oth-

erwise considered decision. Dan Turberville, an attorney who has defended over 40 capital cases in Alabama, testified that for the sentencing phase of a capital case, a minimally competent defense attorney would interview the defendant; speak with the family members; interview any witnesses; speak to a mental health professional to ascertain the defendant's state of mind at the time of the crime; and ascertain any employment history (R. 394-96, Vol. 2). The State did not rebut Mr. Turberville's testimony. Notwithstanding all of this, when it adopted the State's draft opinion, the Rule 32 Court found that there was no Sixth Amendment violation, finding "strategic decisions" by the defense counsel who identified none in his testimony at the Hearing.

Reasons for Granting the Writ

The Sixth Amendment right to effective assistance of counsel is violated when (i) counsel's performance falls "below an objective standard of reasonableness" and (ii) that counsel's deficient performance prejudices the defendant. *Strickland v. Washington*, 466 U.S. 668, 669 (1984); *Wiggins*, 539 U.S. at 521.

I. The Eleventh Circuit Decision Intolerably Conflicts with this Court's Sixth Amendment Jurisprudence and Merits Review

The Eleventh Circuit decision finding that the Alabama courts reasonably denied Mr. Jones' ineffective assistance claim conflicts with this Court's Sixth Amendment jurisprudence under 28 U.S.C. § 2254(d) in several key respects.

First, the Eleventh Circuit's decision is contrary to this Court's stricture that "every effort be made [by a court assessing the reasonableness of counsel's perfor-

mance] to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 669.

Here, the record included the testimony of Mr. Jones' lead trial counsel, Boles, who testified that he made all the decisions concerning trial strategy and evidentiary issues (App. 292a-293a). Boles never explained nor sought to justify his failure to present any mitigating evidence at sentencing as a strategic, tactical or considered decision, nor did the State elicit any such testimony from him. Despite having Boles' uncontroverted evidence regarding his perspective at the time of trial, the Eleventh Circuit, contrary to this Court's dictates in *Strickland*, did not "evaluate the conduct from counsel's perspective at the time," which he testified about at the Hearing. Instead, it manufactured excuses for counsel's deficient performance by speculating as to the existence of strategic decisions for which *no* evidentiary basis exists. *See, e.g.*, App. 19a (finding counsel "*apparently* concluded not to present any psychological or psychiatric testimony at the sentencing") (emphasis added). *See also* App. 184a-216a (surmising that it was "*easy to see why counsel would be reluctant* to call Glen [*sic*] Jones for the second trial after hearing her testimony from the first trial" and that it was a "sound *strategic* decision of trial counsel not to present [her]") (emphasis added). These findings were objectively unreasonable.

While *Strickland* generally accords deference to tactical trial decisions when a reviewing court assesses the reasonableness of counsel's performance, *Strickland* does not license a reviewing court, under the guise of "deference" to "strategy," to conjure up strategic decisions on behalf of counsel when it appears on the face of

the record that counsel made no strategic decisions at all. *See Wiggins*, 539 U.S. at 519, 526-27 (criticizing the "strategic decision" invoked by the state court to justify counsel's "limited pursuit of mitigating evidence" as "resembl[ing] more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing"). *See also Holland v. Jackson*, 194 U.S. 649, 652 (2004) ("whether a state court's decision was unreasonable must be assessed in light of the record the court had before it"); *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999) ("The Court is . . . not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all.").

Other Courts of Appeal also have engaged in this practice. Reliance on mere speculation to excuse counsel's deficient performance, under the rubric of "deference" to counsel's "strategy," is not isolated to this case. *See, e.g., Conklin v. Schofield*, 366 F.3d 1191, 1202, 1204-05 (11th Cir. 2004) (finding counsel's "strategy" of humanizing his client justified not presenting additional character witnesses at capital sentencing even though counsel admitted that he decided not to call them because he "gave up" after the court denied his requests for an independent medical expert); *Chandler v. United States*, 218 F.3d 1305, 1349 (11th Cir. 2000) (6-5 *en banc* decision) (Barkett, J., dissenting) (criticizing the majority for engaging in "mere conjecture" and "superimpos[ing] on [counsel's] actions in hindsight," unsupported by the record, "a strategy of lingering doubt" where counsel "himself never suggested that he pursued any such strategy"); *Bryan v. Mullin*, 335 F.3d 1207, 1225, 1244 (10th Cir. 2003) (6-4 *en banc* decision) (Henry, J., concurring in part and dissenting in part)

(criticizing majority for "insulat[ing]" counsel's performance at sentencing by "conferring upon it an *ex post* strategy that did not exist"). Review of this case would provide the Court with an opportunity to emphasize to lower courts that it is contrary to the dictates of *Strickland* and its progeny, and a violation of the Sixth Amendment, to render counsel's conduct constitutionally adequate by engaging in speculation—unsupported by the record—regarding possible reasons for counsel's conduct.

Second, the Eleventh Circuit decision is in direct conflict with the professional standards for investigation and presentation of mitigating evidence set out by this Court in *Strickland*, as illuminated in the capital context in *Williams*, *Wiggins* and *Rompilla*. In each, this Court applied the *Strickland* test in the specific context of penalty phase ineffectiveness claims based on counsel's failure to investigate and present mitigating evidence. This Court stressed that reasonably effective representation of a capital defendant includes a thorough investigation of the defendant's background for mitigating evidence and its development and presentation to the sentencer at the penalty phase. *See Williams*, 125 U.S. at 396 (trial counsel has an "obligation to conduct a thorough investigation of the defendant's background"); *Wiggins*, 539 U.S. at 534-35 (finding reasonable probability that competent attorney would have presented omitted mitigating evidence at sentencing); *Rompilla*, 125 S. Ct. at 2462-63, 2467-69 (finding counsel was deficient in failing to examine the court file on defendant's prior conviction even though the defendant and his family suggested no mitigating evidence was available). This Court emphasized that counsel's "strategic" decision not to present all available mitigating evidence at sentencing cannot be reasonable in the absence of a reasonable mitigation investigation by counsel. *Wiggins*,

539 U.S. at 511, 526; *Williams*, 529 U.S. at 373, 396; *Rompilla*, 125 S. Ct. at 2470-71.

While this Court has reiterated there is no litmus test for determining whether an attorney's performance was deficient, it seems clear from the lack of investigation and the strength of the mitigating evidence not presented here, and from this Court's consideration of counsel's conduct in *Williams*, *Wiggins* and *Rompilla*, that Mr. Jones' counsel's performance was "not reasonable considering all the circumstances." *See Rompilla*, 125 S. Ct. at 2469-70 (O'Connor, J., concurring), *quoting Strickland*, 466 U.S. at 688. This case presents an extreme example of the type of deficient performance for failure to investigate and present mitigating evidence that this Court condemned in *Wiggins, Williams* and *Rompilla*. As detailed at pp. 6-7 *supra*, Mr. Jones' counsel failed to investigate, develop, argue and present extensive available evidence concerning severe mental illness, borderline intellectual functioning, a childhood of severe abuse and deprivation, a history of alcohol and substance abuse, intoxication on the night of the crime to the point of toxic psychosis, or *any* other mitigating evidence. A decision not to present any of the available mitigation evidence virtually guaranteed a death penalty, as any reasonably competent counsel would know. For the Eleventh Circuit and Alabama courts to manufacture "strategies" not testified to by counsel is particularly unreasonable in light of the complete failure to present *any* mitigation evidence.

Moreover, the Eleventh Circuit simply did not address the reasonableness of counsel's investigation into mitigating evidence even though the record showed it was not reasonable. By failing to judge the reasonableness of counsel's failure to present mitigating evidence by evaluating the reasonableness of the investigation counsel conducted, the Eleventh Circuit unreasonably applied

Strickland under § 2254(d). *See Wiggins*, 539 U.S. at 534. The Eleventh Circuit did not even cite to or discuss *Wiggins* or *Rompilla* and cited *Williams* only to explain the general standard of review under § 2254(d). *See* App. 11a. Had the Eleventh Circuit properly considered and applied *Strickland's* progeny, it would be apparent that Mr. Jones' counsel was far worse than the counsel whose conduct this Court found ineffective in *Williams, Wiggins* and *Rompilla*. Williams' counsel presented *some* mitigating evidence, including three character witnesses and one expert. *Williams*, 529 U.S. at 369. Wiggins' counsel at least mentioned in his opening the age of his client and that his client had no prior convictions. *Wiggins*, 539 U.S. at 515. Rompilla's counsel presented five character witnesses at sentencing who argued for mercy and that there was residual doubt. *Rompilla*, 125 S. Ct. at 2460-61. By stark contrast, Mr. Jones' counsel undertook *no* investigation of potential avenues of mitigation. Mr. Jones' counsel presented *no* mitigating evidence.

Against these stark facts, the Eleventh Circuit's decision agreeing with the Alabama courts that Mr. Jones received constitutionally adequate representation at sentencing cannot stand in light of this Court's clear dictates regarding professional standards of investigation and presentation of mitigating evidence. The Eleventh Circuit simply ignored these highly relevant Supreme Court decisions. This Court should grant review of this case to convey to lower courts that the standards it has set are not to be disregarded.

Third, the Eleventh Circuit's analysis of the prejudice prong of the *Strickland* test is contrary to precedents of this Court illuminating what type of mitigating evidence is so powerful that its omission from a capital sentencing hearing is prejudicial. *See Rompilla*, 125 S. Ct. at 2469 (finding prejudice where evidence of schizophrenia, low intelligence, poor social background and sub-

stance abuse "add[ed] up to a mitigation case [bearing] no relation to the few naked pleas for mercy actually put before the jury," even though "it is possible that a jury could have heard it all and still have decided on the death penalty"); *Williams*, 529 U.S. at 398 ("the graphic description of Williams' childhood, filled with abuse and privation, or the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability"); *Wiggins*, 539 U.S. at 517, 537-38 (finding prejudice where counsel failed to investigate and present mitigating evidence of defendant's "excruciating life history," including evidence of severe physical and sexual abuse and a poor and deprived childhood).

The evidence not investigated and not presented at sentencing here mirrors the evidence not investigated and presented in *Williams*, *Wiggins* and *Rompilla*, in which this Court found the defendant was prejudiced by counsel's deficient performance. (*See* pp. 6-7 *supra* detailing the uninvestigated and unpresented mitigating evidence.) In *Williams*, for example, there was evidence of "mistreatment, abuse, and neglect" during defendant's childhood. *Williams*, 529 U.S. at 370. Counsel failed to introduce it. *Id.* The same is true here. In *Williams*, there was evidence that defendant was borderline mentally retarded and might have mental impairments organic in origin. *Id.* Counsel failed to introduce it. *Id.* The same is true here. (Here, there was also evidence that Mr. Jones was psychotic; that was not introduced either.) In *Williams*, there was evidence that defendant had performed socially responsible acts at other times in his life. *Id.* at 396. Counsel failed to introduce it. The same is true here. In *Williams*, this Court found ineffectiveness because counsel failed to contact a potential character witness even though counsel presented three others. *Id.* Here counsel called none, despite the fact that

six members of Mr. Jones' family and one friend were willing to testify at sentencing. *See supra* p. 5; R. 258, Vol. 2. Here, as in *Williams*, the defendant was prejudiced because, but for trial counsel's unprofessional failures, there is a reasonable probability that Mr. Jones would not have been sentenced to death. *Id.* at 394-95.

This Court repeatedly has found mitigating evidence of the type that was not presented here to be relevant because it tends to diminish blame and moral culpability. *See, e.g., Eddings v. Oklahoma,* 455 U.S. 104, 115 (1982) ("[E]vidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant"); *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989), *quoting California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[P]unishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."); *Wiggins*, 539 U.S. at 538 (*quoting Williams*, 529 U.S. at 398) ("the available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of Wiggins' moral culpability"). Yet here, the Eleventh Circuit unreasonably afforded *no* weight to any of the mitigating evidence presented by post-conviction counsel. *See* App. 25a ("Given the heinousness of the crime and the overwhelming evidence of Jones's guilt, there simply is no reasonable probability that counsels' failure to present evidence of Jones' alleged mental health problems, his abusive childhood, and his exces-

sive drinking on the night of the murders prejudiced Jones.").

The Eleventh Circuit's *ipse dixit* that there was no prejudice here is an unreasonable application of *Strickland* under § 2254(d). This Court has applied the prejudice prong of the *Strickland* test in the specific context of penalty phase ineffectiveness claims based on counsel's failure to investigate and present mitigating evidence at sentencing in no less than three cases in five years. *See Williams*, 529 U.S. 362; *Wiggins*, 539 U.S. 510; *Rompilla*, 125 S. Ct. 2456. In each, the Court determined that the effect of counsel's failure to investigate and present mitigating evidence strikingly similar to the type not presented here—including evidence of mental illness, borderline intelligence, an abusive childhood and alcohol and substance abuse—was prejudicial. But the Eleventh Circuit referred only vaguely to the "proper prejudice standard under *Strickland*" and to no other Supreme Court precedents—including the three most clearly applicable to this case—before concluding there was no prejudice because the evidence presented by post-conviction counsel was somehow not mitigating. *See* App. 25a. The Eleventh Circuit's conclusory dismissal of the ample mitigating evidence presented by Mr. Jones' post-conviction counsel intolerably undermines a defendant's Sixth Amendment right to present, and to have the sentencer consider, all relevant evidence in mitigation. *See Kansas v. Marsh*, 126 S. Ct. 2516, 2523 (2006).

II. Counsel's Failure to Investigate and Present Mitigating Evidence at Sentencing Constituted Deficient Performance Under *Strickland*

This Court has consistently looked to ABA guidelines to determine what constitutes "reasonable" performance under *Strickland*. *See Strickland*, 466 U.S. at 688 ("Pre-

vailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable"); *Rompilla*, 125 S. Ct. at 2459; *Wiggins*, 539 U.S. at 522. As noted in *Wiggins*, the ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989) provide that investigations into mitigating evidence "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins*, 539 U.S. at 524 (emphasis added). Areas of mitigation counsel should investigate and consider presenting include the defendant's "medical history, educational history, employment and training history, *family and social history*, prior adult and juvenile correctional experience, and religious and cultural influences." *Id.*, *quoting* ABA GUIDELINES, 11.8.6.

Unrebutted expert testimony presented at the Rule 32 Hearing established that, as in *Wiggins*, Mr. Jones' counsel's failure to investigate available mitigation evidence was unreasonable in light of local professional standards. *See Wiggins*, 539 U.S. at 524; R. 394-96, Vol. 2. Trial counsel here fulfilled *none* of these standards. Had they done so, they would have discerned substantial and compelling evidence that could and should have been presented to the jury.

A. Failure to Investigate and Present Mitigating Evidence of Mental Illness and Impairment

Boles did not seek to justify his failure to investigate or present mitigating evidence of mental illness and impairment as a matter of trial strategy, or otherwise. This failure falls far short of the standard for reasonable performance under *Strickland*. This Court held in *Wiggins* that counsel must be "fully informed" before making a decision to decline to investigate and that even a "cursory

investigation" cannot be used to "justif[y] a tactical decision with respect to sentencing strategy." *Wiggins*, 539 U.S. at 527. *See also Rompilla*, 125 S. Ct. at 2463.

In considering the reasonableness of counsel's failure to investigate and present available mitigating evidence, the Eleventh Circuit considered neither ABA guidelines nor this Court's application thereof in *Williams*, *Wiggins* or *Rompilla*. Moreover, contrary to this Court's stricture in *Strickland* that reviewing courts "eliminate the distorting effects of hindsight" and evaluate counsel's conduct "from counsel's perspective at the time," the Eleventh Circuit excused counsel's failure to investigate and present mitigating mental health evidence by speculating as to the existence of a strategic decision by Mr. Jones' counsel despite the fact that that very counsel testified post conviction and identified no such strategy. 466 U.S. at 669; *see* App. 19a (emphasis added) (finding "they *apparently* concluded not to present any psychological or psychiatric testimony at the sentencing"). But this finding was based on several unreasonable determinations of the facts in light of the evidence presented, and constituted an unreasonable application of *Strickland*.

First, the Eleventh Circuit unreasonably found that the Lunacy Commission Report indicated that Mr. Jones did not suffer from a mental illness and that much of the evidentiary basis for Mr. Jones' claim arose *after* his trial, during his imprisonment. *See* App. 18a.

The Eleventh Circuit's assertion regarding the Lunacy Commission Report is flatly refuted by the record. That report, which assessed Mr. Jones' capacity to stand trial, stated that Mr. Jones did not have a "mental illness at the time of the acts charged *which would have prevented him from distinguishing right from wrong*" (App. 303a). (emphasis added). But this is not the same as finding

that Mr. Jones did not suffer from *any* mental illness that could be used for *mitigation* purposes. The Eleventh Circuit appears to have conflated Mr. Jones' capacity to stand trial with the availability of unpresented evidence as to mental illness at the penalty phase. This is contrary to clearly established federal law set forth in *Eddings*. In *Eddings*, this Court reversed the petitioner's death sentence where the trial court refused to consider mitigating evidence of defendant's personality disorder on the ground that "he knew the difference between right and wrong at the time he pulled the trigger, and that is the test of criminal responsibility in this State." 455 U.S. at 109-10. *See also Zant v. Stephens*, 462 U.S. 862 (1983) (mental illness as a mitigating factor).

The Eleventh Circuit's finding that much of the evidentiary basis for Mr. Jones' claim arose *after* his trial is also unreasonable. The Lunacy Commission Report noted that "psychiatric evaluations revealed diagnoses of personality disorder." Counsel also had available the underlying evaluations by Commission members as well as a deposition of Dr. Thompson, one of the psychiatrists on the State Lunacy Commission, who conducted a 1979 evaluation of Mr. Jones. *See* App. 302a-304a, 305a-315a, 316a-323a. These evaluations noted that Mr. Jones may have experienced psychotic-like states and auditory hallucinations and evaluated Mr. Jones' condition as "suggestive of organic impairment" (App. 314a). Dr. Thompson reported in 1979 that Mr. Jones "did have some unusual experiences where he thought maybe he heard somebody talking to him" (a sign of schizophrenia) (C. Supp. 610). He also opined that Mr. Jones had a personality disorder, which he explained is a type of mental illness and testified that Mr. Jones' 84 IQ is "low-normal or borderline" (App. 317a). Counsel had ample evidence at the time of trial that Mr. Jones was mentally ill and impaired. As in *Rompilla* and *Wiggins*,

counsel's failure to review available records " 'was the result of inattention, not reasoned strategic judgment.' " *Rompilla*, 125 S. Ct. at 2471, *citing Wiggins*, 539 U.S. at 534.

Second, the Eleventh Circuit's speculation as to a strategic decision by counsel not to present mitigating mental health evidence was based on a finding that counsel talked to Mr. Jones "extensively about the sentencing." *See* App.19a. A review of Boles' testimony reveals, however, that any discussions Boles had with Mr. Jones were limited and had nothing to do with whether to present mental health evidence. Boles testified that he and Davis spoke to Mr. Jones not about mental health issues, but rather about the specific issue of Mr. Jones' prior record (App. 295a). Boles also testified that Mr. Jones was "not very communicative" with him (App. 300a).[3] It was thus unreasonable under § 2254(d) for the Eleventh Circuit to speculate on the basis of counsel's "extensive" discussions with Mr. Jones (for which there is no record support) that "they *apparently* concluded not to present any psychological or psychiatric testimony at sentencing." *See* App. 19a (emphasis added).

Third, the Eleventh Circuit found that Boles "relied heavily upon Davis's knowledge of the case because Davis represented Jones at his 1979 trial." *See* App. 19a. But the fact that Davis participated in the 1979 trial

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[3] The Rule 32 Court's decision may contextualize the Eleventh Circuit's holding here insofar as the Rule 32 Court implied that there had been a strategic decision not to present a mental health defense at the guilt phase. *See* App.191a-196a. But under *Strickland*, such a decision is due no deference because counsel failed to thoroughly investigate available mental health evidence. *See supra* at 17. Moreover, even if counsel rejected a mental health *defense*, Boles did not testify, and there is no record evidence, that counsel made a strategic decision not to investigate and present evidence of mental health in *mitigation*.

should have no impact on Mr. Jones' claim of ineffective assistance. There is no evidence that Davis performed any investigation in 1979 or 1982 (R. 396, Vol. 2). He was retained only two days before the 1979 trial (1979 Tr. 230). In any event, Boles testified that he made all the key strategic decisions at the 1982 trial and he made no investigation as to the existence of mitigating evidence (App. 298a; R. 399-400, 19-A, Vol. 3). It was thus unreasonable and speculative for the Eleventh Circuit to rely on Davis' involvement in the 1979 trial as a basis for its determination that counsel made a strategic decision not to present mitigating mental health evidence in 1982.

The Eleventh Circuit additionally relied on unreasonable determinations of fact, and unreasonable applications of clearly established federal law, made by the Rule 32 Court in its opinion that was drafted by the State. In particular, the Rule 32 Court excused counsel for not presenting available mental health evidence in *mitigation* because counsel had "filed appropriate motions" requesting mental health experts and such motions were denied by the trial court. *See* App. 196a. But counsel did not use the available mental health evidence—the Lunacy Commission records and the Thompson deposition—to make such motions. Moreover, even if the trial court's denial of the motions was an objectively reasonable ground for not presenting expert testimony at sentencing (which is denied), that does not excuse their failure to present the evidence of mental illness—the Commission report, the evaluations, Thompson's testimony, etc.—that counsel then had available to them at sentencing.[4] Moreover, the available information was at least a red flag that should "have led a reasonably competent attorney to investigate

[4] The Rule 32 Court unreasonably dismissed any possibility that had counsel presented the available mental health evidence to the trial court, the trial court would have ruled differently.

further." *Wiggins*, 539 U.S. at 534. *See also Rompilla*, 125 S. Ct. at 2463 (even though counsel reviewed reports from a "cadre of three mental health witnesses who were asked to look into Rompilla's mental state as of the time of the offense and his competency to stand trial" and even though "their reports revealed 'nothing useful' to Rompilla's case," the lawyers were nevertheless ineffective for failing to further investigate and present mitigating evidence). Counsel's failure to do so is particularly unreasonable given Boles' testimony that he had friends in the medical profession with whom he could consult (presumably for free). Boles could not even say that he did so (App. 294a).

The Rule 32 Court also found that "there has been no reasonable dependable diagnosis of psychosis . . . and there is no evidence of psychosis" (App. 198a). This finding is a profoundly unreasonable determination of the facts in light of the uncontroverted evidence of psychosis, including the expert opinions, evaluations, tests and diagnoses of no less than five physicians and expert witnesses. Dave M. Davis, a nationally recognized psychiatrist, testified at the Rule 32 Hearing by way of affidavit (as allowed by the Rule 32 Court) that Mr. Jones suffers from paranoid schizophrenia, a chronic biochemical brain disorder that is a form of psychosis; and that Mr. Jones' schizophrenia had its onset in early adolescence and predated the crimes for which Mr. Jones was sentenced to death (C. Supp. 614-16). The State presented no evidence to the contrary. Dr. Brad Fisher, a forensic psychologist, also testified that Mr. Jones was psychotic and that the family members gave consistent descriptions "going back into his developmental years of withdrawal, no response to abuse, eyes just starring [*sic*] and that these should have been red flags to a condition then" (R. 315, Vol. 2). The State presented no evidence to the contrary. Prison physicians, including two psy-

chiatrists, have, for years, consistently noted Mr. Jones' auditory hallucinations, diagnosed him as psychotic, and treated him with anti-psychotic drugs like Haldol (C. 1130). The Rule 32 Court's dismissal of this evidence is all the more unreasonable because the court opined not on mere evidentiary sufficiency (which would be difficult to do since no contravening evidence exists) but directly on a subject requiring mental health expertise; in so doing, it rejected the unanimous and unrebutted professional opinions of medical experts in favor of its own.

Finally, the Rule 32 Court found that Dr. Fisher's "diagnosis of low intelligence is rebutted by the testimony of family members who stated that [Mr. Jones] did well in school" (App. 199a). This finding is objectively unreasonable. The Lunacy Commission records indicate that Mr. Jones has an I.Q. of 84 (which is indicative of borderline intelligence) (App. 313a, 321a). Family testimony cannot rebut an I.Q. test.

B. Failure to Investigate and Present Mitigating Evidence of Abusive and Deprived Childhood

Boles conducted no investigation into Mr. Jones' childhood or background (R. 436, 19-A, 47-A, Vol. 3). Counsel never even contacted Mr. Jones' family members in connection with the 1982 trial. *See* p. 4 *supra.*

At the Rule 32 Hearing, post-conviction counsel presented evidence that: Mr. Jones was abandoned by his mother as an infant; he was left in the care of his father and his family who abused and neglected him; Mr. Jones' father would strip off his clothes and hog-tie him by his wrists and ankles to a doorknob and whip him with an extension cord, leaving wire embedded in his flesh; and Mr. Jones regularly witnessed his father sexually molest his sister. *See* p. 6 *supra. None* of this mit-

igating evidence was presented at sentencing. The State presented *no* evidence to the contrary.

The Eleventh Circuit concluded that the Alabama courts properly found that counsel were not ineffective for failing to present such evidence at sentencing. App. 23a. This holding contravenes recent Supreme Court precedents mandating that counsel's reasonableness in not presenting mitigating evidence be strictly judged in the light of the reasonableness (or lack thereof) of the mitigation investigation counsel actually conducted. *See Wiggins*, 539 U.S. at 523; *Williams*, 529 U.S. at 395-96; *Rompilla*, 125 S. Ct. at 2467. As in *Wiggins*, *Williams* and *Rompilla*, counsel's failure to investigate and present evidence of Mr. Jones' deprived and abusive childhood was unreasonable. *Wiggins*, 539 U.S. at 524-25 (ineffective assistance of counsel at sentencing where counsel failed to discover and present mitigating evidence such as defendant's severe deprivation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother); *Williams*, 529 U.S. at 395-96 (counsel ineffective at sentencing where counsel failed to conduct an investigation that, among other things, would have uncovered records graphically describing defendant's "nightmarish childhood"); *Rompilla*, 125 S. Ct. 2468 (counsel ineffective at sentencing where counsel failed to review files that would have revealed, *inter alia*, that the defendant was "abused by his father who beat him when he was young with his hands, fists, leather straps, belts and sticks.")

This finding is also based on unreasonable determinations of fact. First, the Eleventh Circuit unreasonably found that other than Glenn Jones' testimony, evidence of abuse was "negligible." *See* App. 23a. The Eleventh Circuit ignored records of the Lunacy Commission that were available to counsel and in which, before trial, Mr.

Jones described some of the severe child abuse he suffered, including the beatings by his father (App. 19a-23a, 305a, 313a). The Eleventh Circuit ignored the testimony of Mr. Jones' family members, six of whom testified at the Rule 32 Hearing that they were not estranged[5] and would have testified about Mr. Jones' horrible childhood and history of substance abuse. *See* p. 15 *supra*. The Eleventh Circuit ignored the testimony of Dr. Fisher that the interviews of family members were consistent with reports of abuse (R. 315, Vol. 2). *None* of this evidence was rebutted by the State. The Eleventh Circuit's finding was thus objectively unreasonable in light of the record evidence.

Second, the Eleventh Circuit unreasonably rejected the evidence of Glenn Jones as "contradictory and potentially more harmful than helpful." *See* App. 23a. Similarly, the Rule 32 Court found that Ms. Jones' testimony was an "exaggeration" and concluded, based on its review of Ms. Jones' testimony, that it was a "sound strategic decision of trial counsel not to present Glen [*sic*] Jones as a witness at trial." *See* App. 207a. The Rule 32 Court reasoned that the jury would not have liked the fact that she allowed drinking and drugs in the presence of her children (App. 206a). Even if Ms. Jones' testimony were unhelpful and contradictory (which is both unfounded and denied), there is no evidentiary support, including any testimony by Boles, that counsel ever considered whether to present Ms. Jones as a witness in the first place, much less that counsel considered the factors referred to by the Rule 32 Court. Accordingly, the Rule 32 Court's finding that it was a "sound strategic decision" not to have presented the testimony of Glenn Jones amounts to mere speculation without evidentiary

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[5] This testimony overwhelmingly contradicts Boles' vague recollection at the Rule 32 Hearing that there was "some problem" with the family (App. 297a, 299a).

support. Moreover, to find that this testimony was an "exaggeration" is objectively unreasonable in light of the record evidence: these beatings were noted in the Lunacy Commission records and testified to by Glenn Jones, and both Mr. Jones and his sister still carry scars (R. 217, Vol. 2; App. 305a, 313a).

C. Failure to Investigate and Present Mitigating Evidence of Substance Abuse and Intoxication on the Night of the Crime

Ample mitigating evidence regarding Mr. Jones' history of substance and alcohol abuse and extreme intoxication on the night of the crime was available to counsel at the time of trial. Glenn Jones and Mr. Jones' girlfriend testified at the 1979 trial regarding Mr. Jones' substance abuse on the evening of the crime and his addiction to drugs (1979 Tr. 929, 932-33, 949, 952). The State Lunacy Commission records noted a history of alcohol and substance abuse (App. 302a, 306a, 308a, 310a). Dr. Thompson of that Commission testified by deposition in 1979 that the combination of alcohol and drugs taken by Mr. Jones on the night of the crime, together with a low IQ, would likely bring on a psychotic state (App. 319a). This was not presented to the jury. Dr. Thompson's conclusions were supported at the Rule 32 Hearing by the testimony of Drs. Fisher and Davis, who opined that (i) Mr. Jones was in a state of toxic psychosis on the evening in question and (ii) the effects of the drugs ingested would have been particularly acute on Mr. Jones due to his mental conditions, including PCP's precipitation of violent behavior in schizophrenics (R. 293, 323-24, 327, 341, Vol. 2; C. Supp. 617-18). *None* of this mitigating evidence was presented to the jury.

The Eleventh Circuit found that Mr. Jones' counsel was not ineffective for failing to present evidence of intoxication or toxic psychosis in mitigation. *See* App.

25a. In so doing, as the Eleventh Circuit failed to address ABA guidelines, this Court's analysis in *Williams*, *Wiggins* or *Rompilla*, or the investigation (or lack thereof) undertaken by counsel, it unreasonably applied *Strickland* under § 2254(d). *See Wiggins*, 539 U.S. at 523 (the reasonableness of counsel's decision not to put on mitigation is strictly judged by the reasonableness of the mitigation investigation counsel actually conducted).

This finding was based on unreasonable determinations of fact in light of the record evidence, and on additional unreasonable applications of *Strickland.* The Rule 32 Court found that any decision not to present this evidence would have been reasonable because "[v]oluntary drug use has never excused *or mitigated* a crime." *See* App. 201a (emphasis added). The Eleventh Circuit let this stand. But this Court has found a history of substance abuse *can be* mitigating. *See Rompilla*, 125 S. Ct. at 2463. Moreover, there was no testimony that Boles gave any consideration as to how the jury would respond to the presentation of evidence of intoxication as it related to sentencing. Absent any evidentiary basis, such finding was objectively unreasonable and contrary to this Court's stricture in *Strickland* that reviewing courts must "evaluate [counsel's] conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 669.

III. Counsel's Deficient Performance Prejudiced Mr. Jones at Capital Sentencing

Prejudice is shown where "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 669, 694. *See also Rompilla*, 125 S. Ct. at 2469 (prejudice exists if the "undiscovered 'mitigating evidence, taken as a whole, "might well have influenced the jury's appraisal" of [the defendant's] cul-

pability' "), *citing Wiggins*, 539 U.S. at 538, *quoting Williams*, 529 U.S. at 398.

The Eleventh Circuit found the Alabama courts correctly determined that the evidence presented at the Rule 32 Hearing was not mitigating evidence that would have changed the outcome of Mr. Jones' sentencing. *See* App. 25a. As shown, the mitigating evidence that existed but was not presented was substantial. *See supra* pp. 6-7. This evidence was unrebutted at the Rule 32 Hearing. No one testified to the contrary, and the State made no other evidentiary showing to rebut the evidence. But the Alabama courts and the Eleventh Circuit essentially refused to recognize the existence of these mitigating factors based on objectively unreasonable findings of fact and unreasonable application of established Supreme Court precedents, as discussed in Section II.

In addition, the courts below unreasonably applied *Strickland* under § 2254(d) in concluding that none of the evidence presented by post-conviction counsel was mitigating. As in *Williams*, the Eleventh Circuit's determination was unreasonable because it failed to include the sum of *all* of the available mitigating evidence when assessing prejudice. *See Williams*, 529 U.S. at 398.

Counsel's failure to present *any* mitigating evidence ensured that the jury would be left with quite possibly the worst impression of Mr. Jones: a previously convicted killer who expressed no remorse for the events of that night. The jury was not able to consider that Mr. Jones was mentally ill, severely intoxicated at the time of the crime, of borderline intelligence and easily led, and the victim of severe abuse. This mitigating evidence is precisely "the kind of troubled history [this Court has] declared relevant to assessing a defendant's moral culpability." *Wiggins*, 539 U.S. at 535 (citing *Penry*, 492 U.S. at 319). *See also supra* at p. 15.

Yet the Eleventh Circuit did not consider any of this in its prejudice analysis. Without reference to any recent Supreme Court precedents, the Eleventh Circuit relied simply on "the heinousness of the crime" in finding that "there simply is no reasonable probability that counsel's failure to present evidence of Jones's alleged mental health problems, his abusive childhood, and his excessive drinking on the night of the murders prejudiced Jones." Contrast the Eleventh Circuit's holding with the situation presented in *Rompilla*:

> Rompilla was 'reared in the slum environment of Allentown, Pa. vicinity. He early came to the attention of juvenile authorities, quit school at 16, [and] started a series of incarcerations in and out [of] Penna. [*sic*] often of assaultive nature and commonly related to over-indulgence in alcoholic beverages.' . . . The same file discloses test results that the defense's mental health experts would have viewed as pointing to schizophrenia and other disorders, and test scores showing a third grade level of cognition after nine years of schooling.

Rompilla, 125 S. Ct. at 2468. Mr. Jones' background and evidence of mental health problems and substance abuse are almost identical to those in *Rompilla*. Although there is no bright line rule as to what constitutes prejudice, considering the totality of the mitigating evidence that was available but not presented, and this Court's analysis of persuasive mitigating evidence in *Williams*, *Wiggins* and *Rompilla*, there is certainly a reasonable probability that a reasonable jury hearing this compelling evidence would not have sentenced Mr. Jones to death. *See Strickland*, 466 U.S. at 695-96 ("the totality of the evidence" must be considered in assessing prejudice).

Conclusion

This Court should issue a writ of certiorari and review the decision of the Eleventh Circuit.

Dated: July 21, 2006

Respectfully submitted,

VINCENT R. FITZPATRICK, JR.
Counsel of Record
HEATHER K. MCDEVITT
STEPHANIE COHEN
WHITE & CASE LLP
1155 Avenue of the Americas
New York, New York 10036
(212) 819-8200

Attorneys for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 04-11911
January 20, 2006

AARON LEE JONES,

Petitioner-Appellant,

—v.—

DONAL CAMPBELL, Commissioner,
Alabama Depa:tment of Corrections,

Respondent-Appellee.

Stephen Clark Jackson, Maynard, Cooper & Gale, P.C., Birmingham, AL, Vincent R. FitzPatrick, Jr., Heather K. McDevitt, Kara F. Headley, White & Case, LLP, New York City, for Jones.

Beth Jackson Hughes, Allison Vernon Barnett, IV, Montgomery, AL, for Campbell.

Appeal from the United States District Court for the Northern District of Alabama.

Before ANDERSON, BIRCH and DUBINA, *Circuit Judges.*

DUBINA, Circuit Judge:

An Alabama jury found petitioner Aaron Lee Jones ("Jones") guilty of capital murder and recommended that he be sentenced to death. After exhausting his state court remedies, Jones filed a federal habeas corpus petition pursuant to 28 U.S.C. § 2254. The district court denied Jones's habeas petition, but granted a certificate of appealability ("COA") on several claims of ineffective assistance of counsel. After a thorough review of the record, and having the benefit of oral argument and the parties' briefs, we affirm the district court's judgment denying Jones habeas relief.

I. BACKGROUND

A. *Facts*

The facts are recited verbatim from the opinion of the Alabama Court of Criminal Appeals on direct appeal from Jones's conviction and sentence.

> Tony Nelson testified that on the morning of November 10, 1978, he was sleeping with his ten-year-old brother, Charlie, in one of the bedrooms of his parents' home in the Rosa community in rural Blount County, Alabama. His thirteen-year-old sister, Brenda, was sleeping with their parents, Willene and Carl Nelson, in another bedroom. Tony's grandmother was sleeping by herself in a third bedroom of the home.

At 3:27 a.m. Tony was awakened by a disturbance inside the home. When the light in his bedroom was turned on, he saw Arthur Lee Giles, a former employee of his father, standing in the doorway of Tony's bedroom. Tony's father appeared and asked Giles to leave. Tony got out of bed and followed Giles to make sure Giles left as directed. As Tony stepped out the back door of the home Giles shouted "here," and shot him twice, once in the neck and once in the chest. Giles, then, re-entered the Nelsons' home. Tony made an effort to go and get a gun, but was unable to do so due to his injuries. Instead, he crawled to, and hid under, his father's truck. Shortly, thereafter, he heard Giles and another man exit his parents' home. He saw the men only from the waist down. He heard one of them say that they needed to find Tony and that the other man should "get the money." After they left, Tony went back inside. In his parents' bedroom he found his mother, his father, his sister, and his brother. All four had been severely wounded and there was blood all over them. Charlie and Brenda responded when Tony asked if anyone was still alive. His parents were dead. Tony rushed Brenda and Charlie to the hospital where all three, including Tony, were treated for their wounds.

Charlie Nelson testified that he saw Giles when his father, Carl Nelson, asked Giles to leave the home. He saw Tony leave and heard two gunshots. Giles, then, reappeared and shot Charlie's grandmother, who was standing in the doorway to Charlie's bedroom. Giles proceeded to Charlie's parents' bedroom from where Charlie heard more gunshots. Charlie ran to his parents' bedroom, where he saw Giles and another man, whom he positively identi-

fied at trial as the appellant. He realized that his mother, his father and his sister had all been shot. He jumped on top of his sister to protect her from further harm. As he lay there, he saw the appellant stab his mother and father with a knife. His mother and father were both moaning as the appellant repeatedly stabbed them. The appellant turned and stabbed Charlie's sister Brenda, who had already been shot above one eye. Charlie was hit in the head several times, after which the appellant stabbed him twice in the back.

On cross-examination Charlie admitted that during appellant's first trial Charlie had stated that Giles and the appellant appeared to be drunk. He also stated that Giles "ordered the appellant around" and directed the appellant to stab his victims.

Brenda Nelson confirmed those parts of Tony's and Charlie's testimony as to things she had witnessed. She identified the appellant at trial as the man she saw repeatedly stabbing her mother. She stated that Giles was the one that shot her, Brenda, in the head.

Dr. Joseph Embry of the Alabama Department of Forensic Science testified that Willene Nelson died from multiple stab wounds that damaged her heart, lungs, and kidneys. Her body received 29 knife wounds (17 stab wounds and 12 slash wounds), numerous lacerations and abrasions about the head from a blunt instrument, and one gunshot wound to the left shoulder. Dr. Embry testified that Carl Nelson died from a combination of gunshot wounds and stab wounds. He was shot once through the heart and once in the left arm. He was stabbed, approximately, eight times, including a stab wound in the neck which severed his spinal cord. He also

received numerous blunt instrument abrasions about the head. Dr. Embry testified that Carl Nelson was alive when he was stabbed in the neck.

Billy Irvin, an investigator with the Blount County Sheriff's Department, testified that he interviewed the appellant at 8:15 a.m. on November 11, 1978. During this interrogation the appellant confessed to his participation in the events at the Nelsons' home the previous night. Appellant's confession was tape recorded and transcribed. The appellant reviewed the transcript of his confession and signed it, voluntarily. After the trial court conducted a hearing and determined that appellant's confession was, indeed, voluntary, Irvin was permitted to read it to the jury.

In appellant's statement, he admitted participating in the activities that resulted in the deaths of Willene and Carl Nelson. According to the appellant, although they never found any money, he and Giles went to the Nelsons' home to rob Carl Nelson. Giles had told the appellant that Carl Nelson had not sufficiently paid Giles for work Giles had done for Nelson in the past. Giles and the appellant had been drinking rum and beer prior to their trip to the Nelson's home. They were both armed with .32 caliber pistols, but appellant's pistol would not fire at the Nelsons' home because he lost the firing pin. The appellant's statement confirmed the gruesome details of the attack on the Nelson family. He stated that by the time he entered the back bedroom, Giles had already shot and stabbed "everyone." In his own words the appellant stated:

> "I goes off in the other room where he [Giles] at . . . shot and stabbed them all there, you

> know, the kids and . . . he looks at me and tells me, you know, that I had to do something and I told him that I didn't have a knife so he gave me one and I cut the mother and another man and cut the boy and that's all I did."

The appellant further stated that he used a butcher knife that Giles had, apparently, obtained from inside the Nelsons' home. He also said that the "little girl" at one point begged him not to do it, and that the "woman" moved right before he stabbed her. The appellant explained that when he stabbed the "woman" he "really was just so gone, I just closed my eyes" and stabbed wildly.

Although his confession was admitted into evidence, the appellant did not testify in his own behalf at trial, except during the suppression hearing on the issue of the voluntariness of his confession. In defense, he presented excerpts of the transcribed testimony, from his first trial, of several state's witnesses for impeachment purposes. He also presented his alleged accomplice, Arthur Lee Giles, who invoked his Fifth Amendment rights, and refused to testify. Appellant's theory in defense was that his participation in the double murder fell short of capital murder because Giles did all the actual killing and he, the appellant, only did what Giles instructed him to do.

The jury found the appellant "guilty as charged in the indictment" and the trial court, in accordance with the jury's recommendation, sentenced the appellant to death by electrocution.

Jones v. State, 520 So.2d 543, 545-46 (Ala. Crim. App. 1984).

B. *Procedural History*

In 1979, an Alabama jury found Jones guilty of murder made capital because two or more human beings were intentionally killed by one or a series of acts. *See* Ala.Code § 13-11-2(a)(10) (1979) (repealed in 1981). The jury recommended a death sentence, and the judge agreed with the jury's recommendation. The Alabama Court of Criminal Appeals reversed the trial court's judgment and ordered a new trial pursuant to *Beck v. Alabama,* 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), and *Ritter v. State,* 403 So.2d 154 (Ala.1981). *See Jones v. State,* 403 So.2d 1 (Ala.Crim.App.1981).

Following a retrial in 1982, a jury again found Jones guilty of capital murder and recommended that he be sentenced to death. The trial court followed the jury's recommendation and sentenced Jones to death. On appeal, the Alabama Court of Criminal Appeals remanded Jones's case for the trial court to clarify its sentencing order regarding the mitigating and aggravating circumstances. Following this limited remand, the Alabama Court of Criminal Appeals affirmed Jones's conviction and death sentence. *See Jones v. State,* 520 So.2d 543 (Ala.Crim.App.1984). The Alabama Supreme Court affirmed, *see Ex parte Jones,* 520 So.2d 553 (Ala.1988), and the United States Supreme Court denied *certiorari* review. *See Jones v. Alabama,* 488 U.S. 871, 109 S.Ct. 182, 102 L.Ed.2d 151 (1988).

In March 1990, Jones filed a petition for post-conviction relief pursuant to Rule 32, Ala. R.Crim. P., challenging his 1982 conviction and sentence. In May 1994, Jones filed an amended Rule 32 petition, reiterating numerous claims of ineffective assistance of counsel alleged in his original Rule 32 petition, and raising numerous other claims for relief. In November 1995, the

trial court conducted an evidentiary hearing on Jones's allegations of ineffective assistance of counsel. In March 1996, Jones submitted several documents to support the allegations in his Rule 32 motion; namely, affidavits or depositions from Dr. B.E. Blankenship, Dr. Richard Cooksey, and Dr. James C. Thompson, who testified regarding Jones's mental health and childhood. In June 1996, the trial court entered an order denying Jones post-conviction relief.

In January 1997, Jones petitioned the trial court to supplement the record on appeal with an affidavit of Dr. Dave Davis, and the deposition of Dr. Scott Joseph. Jones stated that he filed courtesy copies of these two documents with the trial court in March 1996, but these documents were not part of the clerk's record. Dr. Davis, a psychiatrist, diagnosed Jones as suffering from paranoid schizophrenia. He also opined that Jones was in a state of toxic psychosis on the night of the murders, and due to this, Jones would have been unable to form the necessary intent to commit the crimes. R. Supp. Vol. 3, p. 616-18. Dr. Joseph, a psychiatrist, stated in his deposition that Jones had a history of psychosis and was taking Haldol to control his psychotic symptoms. R. Supp. Vol. 2, p. 384. However, Dr. Joseph admitted that at the time he evaluated Jones, Jones had no active psychotic features. *Id.* at 390. Dr. Joseph also acknowledged that he relied on Jones's prison medical charts to form his opinion. *Id.*

The Alabama Court of Criminal Appeals affirmed the trial court's order denying Jones post-conviction relief, *see Jones v. State,* 753 So.2d 1174 (Ala.Crim.App.1999), and the Alabama Supreme Court denied Jones's petition for writ of *certiorari.*

On December 15, 2000, Jones filed the present federal habeas petition. In his § 2254 petition, Jones alleged

numerous claims of ineffective assistance of trial and appellate counsel. In addition, Jones asserted that (1) the state trial and appellate courts failed to consider adequately both statutory and non-statutory mitigating circumstances; (2) the trial court erred in failing to hold a competency hearing; (3) the evidence at trial was insufficient to show that he intended to kill anyone; (4) his conviction and death sentence were racially tainted; (5) the practice of Alabama appellate courts of limiting death penalty proportionality review to other death-sentenced cases results in an arbitrary application of the death penalty; (6) electrocution violates the Eighth and Fourteenth Amendments; (7) he was deprived of a fair and impartial jury because a particular juror failed to disclose during voir dire that he knew the sheriff, the deputies involved in the investigation, and the victims; and (8) he was deprived of a fair trial because a juror injected improper information into the jury deliberations. The district court denied Jones relief. The district court also denied Jones's motion to alter or amend the judgment, but did grant Jones a COA on four claims of ineffective assistance of counsel.

II. ISSUES

1. Whether Jones was deprived of his Sixth Amendment right to effective assistance of counsel with respect to sentencing counsels' alleged failure to investigate thoroughly and present properly mitigating evidence of Jones's abusive childhood, mental health problems, and intoxication.

2. Whether Jones was deprived of his Sixth Amendment right to effective assistance of counsel because of counsels' failure to object to the trial court's jury instructions relating to the burden of proving malice.

3. Whether Jones was deprived of his Sixth Amendment right to effective assistance of counsel on appeal because of counsel's failure to raise and argue on appeal issues related to the jury instructions on proving malice.

4. Whether Jones was deprived of his Sixth Amendment right to effective assistance of counsel because of counsel's alleged racial bias against him.

III. STANDARD OF REVIEW

This court reviews for clear error the district court's findings of fact and reviews *de novo* both questions of law and mixed questions of law and fact. *Nyland v. Moore,* 216 F.3d 1264, 1266 (11th Cir.2000). An ineffective assistance of counsel claim is a mixed question of law and fact that the court reviews *de novo. See Dobbs v. Turpin,* 142 F.3d 1383, 1386 (11th Cir.1998). Since Jones's petition was filed after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), we, in essence, review the decisions of the state courts. Pursuant to AEDPA,

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light

> of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1), (2). Furthermore, a state court's factual findings are presumed correct, unless rebutted by the petitioner with clear and convincing evidence. *Id.* at 2254(e)(1).

> A state court decision is "contrary to" clearly established federal law if either (1) the state court applied a rule that contradicts the governing law set forth by Supreme Court case law, or (2) when faced with materially indistinguishable facts, the state court arrived at a result different from that reached in a Supreme Court case. *See Bottoson v. Moore*, 234 F.3d 526, 531 (11th Cir.2000). A state court conducts an "unreasonable application" of clearly established federal law if it identifies the correct legal rule from Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case. *See id.* An unreasonable application may also occur if a state court unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context. *See id.* Notably, an "unreasonable application" is an "objectively unreasonable application." *See Williams [v. Taylor]*, 529 U.S. [362], 412, 120 S.Ct. [1495], 1523, 146 L.Ed.2d 389 [(2000)].

Putman v. Head, 268 F.3d 1223, 1240-41 (11th Cir. 2001). Lastly, clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 1523, 146 L.Ed.2d 389 (2000).

IV. DISCUSSION

The petitioner's burden to prove, by a preponderance of the evidence, that counsel's performance was unreasonable is a heavy one. *See Chandler v. United States,* 218 F.3d 1305, 1313 (11th Cir.2000) (*en banc*). In order to establish deficient performance, the petitioner must show that, in light of all the circumstances, counsel's performance was outside the wide range of professional competence. *See Strickland v. Washington,* 466 U.S. 668, 690, 104 S.Ct. 2052, 2066, 80 L.Ed.2d 674 (1984). The court's review of counsel's performance should focus on "not what is possible or what is prudent or appropriate, but only [on] what is constitutionally compelled." *Chandler,* 218 F.3d at 1313 (quoting *Burger v. Kemp,* 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)). The court's review of counsel's performance must be highly deferential, and the court must avoid second-guessing counsel's performance. *See Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. If the record is not complete regarding counsel's actions, then the courts should presume "that what the particular defense lawyer did at trial-for example, what witnesses he presented or did not present-were acts that some reasonable lawyer might do." *Chandler,* 218 F.3d at 1314-15 n. 15. Moreover, the courts make an objective inquiry into the reasonableness of counsel's performance. *Id.* at 1315. For a petitioner to show deficient performance, he "must establish that no competent counsel would have taken the action that his counsel did take." *Id.*

Lastly, there are no absolute rules dictating what is reasonable performance because absolute rules would restrict the wide latitude counsel have in making tactical decisions. *See id.* at 1317. "As such, at a sentencing proceeding, counsel is not required to present all mitigation

evidence, even if additional mitigation evidence would have been compatible with counsel's strategy." *Putman*, 268 F.3d at 1244. "Counsel's complete failure to present mitigation evidence does not necessarily constitute deficient performance, even if mitigation evidence is available." *Id.*

In light of these precepts, we will consider each of Jones's claims of ineffective assistance of counsel.

A. *Investigation and presentation of mitigating evidence*

Jones posits that his trial counsel, Jack G. Davis ("Davis"), who represented Jones at both trials, and George M. Boles ("Boles") were ineffective at sentencing for failing to present evidence of his mental illness, his abusive and deprived childhood, and his substance abuse and intoxication on the night of the murders. Jones claims that this mitigation evidence would have established the existence of three statutory mitigating factors and negated two of the aggravating factors argued by the State, and the evidence would have cast substantial doubt on whether Jones had the specific intent required under Alabama's capital murder statute. Jones asserts that his counsel did no mitigation investigation: they did not speak with his family, friends or neighbors; they did not follow up on clear evidence of his mental illness; and they did not request his medical, educational, employment, or correctional records. Jones contends that this total failure to investigate available mitigation evidence was unreasonable in light of local professional standards. Therefore, Jones asserts that he did not receive the effective assistance of counsel guaranteed by the Sixth Amendment.

1. mental illness

Jones claims that he is, and was at the time of the crime, psychotic, that he suffers from organic brain damage, and that he is a dependent personality and easily coerced. Jones asserts that numerous psychiatrists, psychologists and physicians have diagnosed him as psychotic. Jones contends that because his counsel failed to investigate his mental health history, the jury did not know about his psychosis.

With regard to this claim, the trial court made findings of fact following the Rule 32 evidentiary hearing. The trial court noted that Jones presented the testimony of Dr. Brad Fisher, an expert in clinical forensic psychology. Dr. Fisher testified that Jones suffered at the time of the crime and continues to suffer from significant mental conditions, such as dependency, multi-substance abuse, organic impairment, and major thought disorder. In reaching this opinion, Dr. Fisher reviewed Jones's prior court records, family members' affidavits, medical records, and prison records, which consisted of depositions from Dr. Thomas L. Smith and Dr. James C. Thompson in 1979, and the 1979 evaluation by Drs. Thompson and Smith done at Bryce Hospital for the Lunacy Commission. Dr. Fisher also personally evaluated Jones and interviewed family members, such as Maritha Erby (mother), Glen Jones (sister), Henry Erby (half-brother), Phyllis Faevers (half-sister), Johnny Wright (uncle), and Barbara Jones (niece).

The trial court then made the following factual findings:

> The record reflects that counsel for petitioner investigated and pursued a mental health defense for the first trial. Petitioner had been evaluated by the Lunacy Commission. Previous counsel, during the

first trial, had filed appropriate motions for mental evaluations and had conducted depositions of the mental health experts who evaluated petitioner. The trial court subsequently denied the motion for private psychiatric examination and testing and funds for an expert witness in the field of mental health to perform intelligence and personality tests on the petitioner. Thereafter, petitioner was granted his right to refile his motion for psychiatric examination and said motion was granted.

Subsequently, in preparation for the second trial, Jack Davis filed a motion for expert witnesses including mental health experts and filed a motion for private psychiatric examination and testing. That was denied by the Court on December 7, 1982. This Court finds that counsel in the 1982 trial filed the appropriate motions requesting mental health experts and the appropriate evaluations and tests to be performed upon petitioner and was denied relief by the Court. Petitioner claims that Davis and Boles did not adequately present the testimony available to them as to the mental health of the petitioner and had they presented the available information, they would have been allowed to present the testimony before the jury.

This Court, after having reviewed the records that were reviewed by Dr. Fisher, the testimony of witnesses and the depositions submitted by both parties of the prison physicians that treated the petitioner, finds that the basis for Dr. Fisher's opinion is questionable.

The first area of doubt is the diagnosis of psychosis. It appears that the original diagnosis was made by Dr. Richard Cooksey, a general practitioner for

inmates in the prison system. On October 17, 1991, he examined the petitioner for weight loss. Petitioner had a weight-loss problem and Dr. Cooksey, not finding a physical reason for the problem, doubted an organic basis for weight loss and felt that the weight loss was a result of the petitioner just not eating. Petitioner told him that he would not eat anything on his tray if the tray came in contact with anything "unclean." Although in his records he wrote that petitioner admitted auditory hallucinations, the doctor admitted that they were poorly described at the time. The doctor could remember nothing about the nature of the hallucinations. Admitting that he was not a psychiatrist, the doctor stated, "If he is not eating, he's psychotic. That's pretty much normal day-to-day functioning, eating." . . . He made notes reflecting his diagnosis of petitioner in the medical records of petitioner and recommended that petitioner would be best served at Kilby Correctional Institution where he would get treatment for his mental health.

. . . Therefore, even though the medical records indicate some sort of mental health history, including earlier records of the Lunacy Commission, this Court concludes that there has been no reasonable dependable diagnosis of psychosis to support the opinion of Dr. Fisher, and indeed it appears to this Court that there is no evidence of psychosis.

Although Dr. Fisher states that his testing showed that there is some organicity in the psychosis and other mental problems of the petitioner, there is no evidence to support this opinion . . . . This Court notes that it allowed the petitioner to be tested for any organic basis for mental health problems. Peti-

> tioner was transported to a facility which could perform the tests, but no test results or testimony was presented to this Court as to the result of those tests. Therefore, this Court concludes that there is no evidence of an organic basis for any mental health problems the petitioner might have.
>
> The diagnosis of low intelligence is rebutted by testimony of family members who stated the petitioner did well in school and no evidence was presented to contradict that. Although the petitioner quit school before he graduated, he did later obtain his GED, which rebuts any evidence of low intelligence to the point where it would have an effect on the outcome of his trial or sentencing.
>
> . . .
>
> All the testimony as to drug use reflects that the drug use was voluntary and there was no evidence of organic effects of his long-term drug use. Voluntary drug use has never excused or mitigated a crime of this nature in the State of Alabama nor does it in this case.
>
> After considering the testimony of Dr. Fisher and examining the basis from which he formed his opinion, this Court is of the opinion that there is no credible evidence of significant mental health problems in petitioner.

R. Vol. 8-9, ¶. 1050-1055.

On appeal, the Alabama Court of Criminal Appeals agreed with the trial court's findings.

> We agree with the trial court that the evidence presented by Jones in support of this claim, including the testimony of Dr. Fisher and the depositions and affidavit of other expert witnesses, was not adequate

> evidence of a mitigating circumstance and was refuted by other testimony and evidence admitted at the hearing and at trial.

Jones v. State, 753 So.2d at 1194. The court also found it significant that the trial court provided Jones with an opportunity to be tested to determine an organic basis for the alleged mental health problems, but Jones admitted no test results at his Rule 32 hearing and relied instead on opinion evidence. *Id.* The court also found significant the finding of the Lunacy Commission that Jones was not suffering from a mental illness at the time of the acts charged that would have prevented him from distinguishing right from wrong. *Id.* at 1194-95. The court concluded that Jones had failed to establish his burden with respect to this claim of ineffectiveness. *Id.* at 1195.

The state courts' determination that Jones did not meet his burden on the claim of ineffective assistance of counsel with regard to the presentation of mental illness mitigation evidence is not an unreasonable application of clearly established law and is not based on an unreasonable determination of the facts. *See* 28 U.S.C. § 2254(d)(2). As the district court noted, "[m]uch of the evidentiary basis for petitioner's current claim of mental illness arose *after* his trial, during his imprisonment. Certainly, it was not objectively unreasonable for the state courts to discount this evidence that did not exist at the time the trial occurred." District Court Record Vol. 2, Tab 27, p. 49. The information counsel had before them at the 1982 trial was the 1979 Lunacy Commission Report which indicated that Jones did not suffer from a mental illness. Furthermore, Boles testified at Jones's Rule 32 hearing[1] that Jones did not have any problems

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[1] Jones's other counsel, Jack Davis, did not testify at the post-conviction hearing because he is deceased.

communicating with him and Davis during trial. *Id.* at 167. Boles stated that he and Davis talked to Jones extensively about the sentencing, and they apparently concluded not to present any psychological or psychiatric testimony at sentencing. *Id.* at 105, 146. Boles emphasized that he relied heavily upon Davis's knowledge of the case because Davis represented Jones at his 1979 trial. *Id.* at 68.

The factual determination made by the state courts is presumed to be correct unless the petitioner can rebut the presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1); *see also Robinson v. Moore,* 300 F.3d 1320, 1342 (11th Cir.2002), *cert. denied, Robinson v. Crosby,* 540 U.S. 1171, 124 S.Ct. 1196, 157 L.Ed.2d 1224 (2004). Jones presents no evidence to rebut the state courts' finding that Boles and Davis were not ineffective for failing to present at sentencing any evidence of Jones's alleged mental illness. At the time of trial, they did not have any evidence to indicate any potential mental illness, and instead, had a Lunacy Commission Report that stated to the contrary. Boles also stated that Jones had no problems communicating with him and Davis during trial, and he and Davis discussed whether to present mental health testimony at sentencing and concluded not to present such testimony. In light of this, we cannot say that the state courts' finding that Jones's counsels' performance was not deficient was an unreasonable determination of the facts.

2. *abusive childhood*

Jones contends that his counsel were ineffective because they did not present in mitigation any evidence of his abusive childhood. Jones asserts that the state courts' determination that the evidence of abuse was

negligible was an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

The trial court found as follows concerning Jones's alleged abuse:

> Petitioner's sister, Glen Jones, testified to abuse by their father. She testified that her father was rarely around but when he did come that he would make petitioner and Glen take off their clothes, would tie them to a door knob and beat them with a cord. She testified that the beatings with a cord were so severe that wire from the extension cord was embedded in their flesh. The Court concludes that this is an exaggeration and that had this abuse occurred there would be some obvious scarring from where such young children were beaten to the point where the insulation of an extension cord was torn off and wire was embedded in their skin. The other evidence of abuse is negligible.
>
> The opinion of Dr. Fisher as to the effects upon petitioner of this "abusive childhood" is rebutted by other family members that testified, including Glen Jones. Their testimony suggests that, although petitioner had to live with relatives and was beaten by his father and had other problems with family members, he adjusted well. Petitioner made good grades in school and had no trouble with teachers. He was helpful to people and was polite and well behaved. He was able to maintain employment and although he had a few problems with attendance, was generally considered to be a good worker. Petitioner attended church and played in the school band. He was not a violent person growing up.

R. Vol. 8-9, ¶. 1053-54.

The trial court further noted that seven of Jones's family members testified at the Rule 32 hearing regarding Jones's childhood and upbringing. The trial court concluded that the evidence presented by the family members did not establish any mitigating circumstances that would have changed the outcome of Jones's sentence. In so concluding, the trial court noted that it was "easy to see why counsel would be reluctant to call Glen Jones for the second trial after hearing her testimony from the first trial." R. Vol. 9, p. 1059.

> The petitioner was at her house the night of the murders. The sister testified that prior to leaving with Giles to go to the Nelsons, Jones was shooting drugs in her house. She did not question or object to the use of drugs by her brother in her house with her children present. She also testified as to the extent that everybody was intoxicated or high, which was inconsistent with her testimony that she allowed no one but her brother to use drugs in her home. Her testimony as to how Giles talked Jones, the petitioner, into going to the Nelsons, shows that there was not much coercion utilized by Giles. He simply asked Jones more than once to go and Jones agreed. This testimony would have seriously prejudiced the petitioner in the trial of this case and since petitioner was convicted in his 1979 trial, trial counsel in the 1982 trial had good reason to avoid using Glen Jones as a witness.

Id. at 1059-60. The court provided further assessment of the family members' testimony:

> The mitigating evidence presented by the petitioner shows no more than a child of a broken family that had positive and negative influences in his life but chose to follow the friends that he grew up with that

> were taking drugs. From the testimony of these witnesses it is apparent that petitioner had the ability to do well in school, had people in whom he could confide and by whom he could be advised, was involved in church activities such as choir and other extracurricular activities such as playing in the school band. The petitioner's temperament was peaceful and the only negative influence appears to be the influence of his friends who used drugs.
>
> Aaron Jones had the abilities and the opportunities to make the choices that everyone has to make in life and made the incorrect choice. When Aaron Jones started using drugs his life changed. His mitigation is that the drugs made him commit the crime. Frequently this has been interposed as a defense and as mitigation but it has never been accepted as an excuse to mitigate this type of crime.
>
> The testimony of these witnesses is unconvincing. Had it been presented to the jury it would not establish mitigation for the acts of the petitioner.

Id. at 1062.

After reviewing the testimony of Jones's family members and friends, the Alabama Court of Criminal Appeals agreed with the trial court's finding. The court concluded that "none of their testimony supported a finding of a mitigating circumstance recognized by § 13A-5-51, Ala.Code 1975, and would not have changed the balance of the mitigating and aggravating circumstances in Jones's case." *Jones v. State,* 753 So.2d at 1196-97. The court further noted that because there was no error in the trial court's determination that the evidence would not have changed the outcome of Jones's trial, it could not say that Jones's trial counsel were ineffective for failing to present the testimony of Jones's family members and

friends. *Id.* at 1197. "Jones has not established a reasonable probability that but for his counsel's failure to call these witnesses and present the alleged mitigating evidence during the sentencing phase of his trial that the outcome of the sentencing proceeding would have been different." *Id.* Thus, the appellate court agreed with the trial court's ruling that Jones's counsel were not ineffective in failing to call these family members to testify at sentencing. *Id.*

Based upon our review of the entire record, we conclude that the Alabama courts properly found that Jones's attorneys were not ineffective in failing to present evidence at sentencing about his abusive childhood and upbringing. The testimony at the Rule 32 hearing indicates that other than Glen Jones's testimony, the evidence of abuse was negligible. Additionally, Glen Jones's testimony was contradictory and potentially more harmful than helpful. Furthermore, Boles testified that he recalled that Davis talked to family members and mentioned that there was some problem or estrangement within the family. R. Vol. 1, p. 102. In light of this, we cannot say that the Alabama courts' determination is contrary to or involves an unreasonable application of federal law as determined by the Supreme Court. Nor can we say that the state courts' decision is based on an unreasonable determination of the facts that were presented during the state court proceedings.

3. substance and alcohol abuse

Jones asserts that his attorneys were ineffective because they failed to present evidence that he was suffering from a toxic psychosis on the night of the murders and was not able to appreciate the criminality of his conduct or to conform his conduct to the requirements of the

law. The trial court noted Glen Jones's testimony that Jones had been drinking and doing drugs the night of the murder in its consideration of the possible mitigation evidence counsel should have presented at sentencing. The trial court, however, did not single out this issue as one of ineffectiveness, nor did the Alabama Court of Criminal Appeals. The portion of the state court opinion that Jones attacks deals with counsels' failure to present intoxication as a defense during the guilt phase of the trial. *See Jones v. State,* 753 So.2d at 1190-91.

The district court considered this issue and found that counsel were not ineffective for failing to present evidence of Jones's intoxication in mitigation. The district court noted that evidence of Jones's drug use was presented to the jury during the guilt stage. Witnesses testified at the 1982 trial that Jones appeared drunk, and Jones admitted in his confession that he had been drinking heavily the day of the murder, and that he was "so far gone" that he stabbed wildly. The district court concluded that there was no reason to believe that the jury failed to consider this guilt stage testimony for whatever mitigating power it had during the sentencing stage. District Court Record, Vol. 2, Tab 27, ¶. 41-42.

Because Jones did not raise this specific claim of ineffective assistance of counsel in state court, the claim is procedurally barred. *See Johnston v. Singletary,* 162 F.3d 630, 634-35 (11th Cir.1998). Assuming *arguendo* that Jones raised in state court the specific claim that counsel were ineffective for failing to present evidence of his toxic psychosis in mitigation, the claim lacks merit. The only evidence Jones proffers to support his claim is the affidavit of Dr. Davis. Dr. Davis opined that Jones was suffering from toxic psychosis on the night of the murders; however, Dr. Davis's affidavit was submitted after the Rule 32 hearing, and the State had no opportunity to

cross-examine him. Because Jones fails to present any credible evidence to support his claim of toxic psychosis, he cannot show that his counsel were ineffective for failing to present this alleged evidence in mitigation.

4. prejudice

Jones cannot demonstrate that his counsels' performance at sentencing was deficient. Nor can Jones demonstrate that he was prejudiced by counsels' failure to present the mitigating evidence of Jones's alleged mental illness, his abusive childhood, and his alleged toxic psychosis. As noted earlier, the Alabama state courts correctly found that the evidence submitted by Jones during his state post-conviction proceeding was not mitigation evidence that would have changed the outcome of his sentencing. The Alabama Court of Criminal Appeals applied the proper prejudice standard under *Strickland* and found that Jones did not establish "a reasonable probability that but for his counsel[s'] failure to call these witnesses and present the alleged mitigating evidence during the sentencing phase of his trial that the outcome of the sentencing proceeding would have been different." *Jones v. State,* 753 So.2d at 1197. The court considered the totality of the alleged mitigation evidence and concluded that "because we have determined that evidence of Jones's alleged mental illness, the forensic evidence, and the testimony of family and friends would not have established a mitigating circumstance, we cannot hold that Jones's trial counsel [were] ineffective for failing to present this evidence." *Id.*

Given the heinousness of the crime and the overwhelming evidence of Jones's guilt, there simply is no reasonable probability that counsels' failure to present evidence of Jones's alleged mental health problems, his

abusive childhood, and his excessive drinking on the night of the murders prejudiced Jones. Jones, armed with a gun, went with Giles to rob the Nelsons. Once inside the house, Jones stabbed three of the four victims, two of whom died from these injuries. Moreover, Jones stabbed the victims in front of their two children, while one child begged him to stop. Jones also stabbed one of the children in the back. In light of this evidence, there is no reasonable probability that the outcome of the sentencing proceeding would have been different had counsel presented this mitigation evidence. Accordingly, Jones is not entitled to relief on these claims of ineffective assistance of counsel.

B. *Objection to malice instruction*

Jones contends that his counsel were ineffective for failing to object to an improper burden-shifting charge on malice. Jones asserts that the jury instruction on the element of malice created a mandatory presumption that relieved the State of its burden of persuasion and shifted the burden to him. The trial court instructed the jury as follows:

> Now, we have [a] statute which defines murder in the first degree. This statute says that every willful, deliberate, malicious and premeditated killing of a human being is murder in the first degree. Now I will undertake to define these four terms for you in order that you may better understand them, and in doing so, will use the language used by the Supreme Court many years ago.
>
> Willful means governed by the will without yielding to reason. Deliberate means formed with deliberation in contradistinction to a sudden and rash act.

> Malice means done with a fixed hate or wicked intention or a motive, not the result of a sudden passion. That is the definition of actual malice. But the word malice, as used in this statute which defines murder, has a broader meaning than that. It includes, not only actual malice, but includes what we call legal or implied malice. And in the broader sense, it means the state or condition of the mind which prompted a person to do an unlawful act without legal justification or extenuation.
>
> Now every intentional and unlawful killing of a human being is presumed to be done with malice aforethought unless the circumstances that surround the killing rebut the idea of malice. Every intentional and unlawful killing of a human being with a deadly weapon, such as a pistol or with a knife, is presumed to be done with malice unless the evidence that proved the killing rebuts the presumption of malice.

R. Vol. 7, ¶. 683-85.

On appeal from the trial court's denial of post-conviction relief, the Alabama Court of Criminal Appeals concluded that the instruction did not require the jury to infer or presume the element of malice aforethought in the absence of evidence from Jones that such a presumption was unwarranted. *See Jones v. State,* 753 So.2d at 1189. In so concluding, the court noted that "the predicate fact supporting the presumption is Jones's intentional and unlawful killings of the victims with a deadly weapon, i.e., a knife." *Id.* at 1188. The jury was to presume from the proof of the killings that Jones committed the murders with malice aforethought. "However, in order for the jurors to reach that conclusion, the State had to prove that Jones killed the victims intentionally

and that the circumstances of the killings evidenced that Jones acted with malice aforethought." *Id.* The court found that the instruction did not shift the State's burden to establish the element of malice. *Id.* at 1188-89 (relying on *Francis v. Franklin,* 471 U.S. 307, 314, 105 S.Ct. 1965, 1971, 85 L.Ed.2d 344 (1985)). The court further noted that the trial court also gave a charge concerning Jones's presumption of innocence and the State's burden of proof. Thus, the court found that in considering the jury charge in its entirety, any error was cured by the additional charges. *Jones,* 753 So.2d at 1189. Accordingly, the court concluded that "[b]ecause Jones ha[d] failed to establish that the trial court's instruction on malice constituted error, he ha[d] failed to show that his trial counsel w[ere] ineffective for failing to challenge this instruction." *Id.*

The district court agreed with the Alabama Court of Criminal Appeals that the instruction on malice did not relieve the State of its burden of proving every element of capital murder. However, the district court expressed some concern with the state appellate court's reasoning in addressing this issue. In a footnote, the district court stated that the state appellate court concluded that the instruction in this case involved merely a permissive inference, not a mandatory presumption. In *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), and *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985), the Supreme Court cautioned that the words "presume" or "presumption" imply a mandatory finding, not merely a permissive inference the jury may or may not draw. *Francis,* 471 U.S. at 316, 105 S.Ct. 1965. Thus, the district court found it difficult to say that the conclusion reached by the state appellate court was not "contrary to" *Francis.* District Court Record Vol. 2, Tab 27, p. 83-84 n. 14. Likewise, the dis-

trict court noted that the state appellate court concluded that the general instruction about the defendant's presumption of innocence and the State's burden of proof cured any defect in this particular instruction on malice. The district court noted that both *Sandstrom* and *Francis* rejected the notion that such general instructions are adequate to cure a specific burden-shifting instruction. Thus, the district court found that the state appellate court's reasoning was "contrary to" *Francis. See id.*

However, the district court agreed that Jones did not receive ineffective assistance due to counsels' failure to object to the malice instruction. The district court concluded that the instruction did not really relieve the State of the burden of proving all elements of the offense of capital murder; and second, if the instruction was error, it was harmless error in light of the overwhelming evidence against Jones. Thus, under either rationale, counsels' failure to object to the instruction did not prejudice Jones. The district court concluded:

> Alabama law defines malice in this context as "the state or condition of the mind which prompted a person to do an unlawful act without legal justification or extenuation." Under the court's instruction, the jury "presumed" malice, that is, that the murders were done with a recognition that they were "without legal justification or extenuation," only after finding first that the killings were "intentional and unlawful." The state always retained the burden of proving both that the killings were intentionally done by petitioner and that they were unlawfully done by him. The jury's finding that the killings were intentional and unlawful was, in effect, a finding of malice, notwithstanding the presumption contained in the instruction.

Finally, coupling the explicit placement of the burden of proving intentional and unlawful killings on the state with the concluding phrase of the instruction that malice is presumed "unless the evidence that proved the killing rebuts the presumption of malice," it becomes apparent that the instruction always required the State's evidence to prove malice. If the "evidence that proved the killing," that is, the State's evidence, failed to show malice, then the presumption was rebutted. The instruction never required the petitioner to offer any rebutting evidence; rather, it lay entirely in the State's burden of proof. Thus, the instruction did not shift the burden to the petitioner and, therefore, was not objectionable.

Even if the instruction can be regarded as a burden-shifting instruction in violation of *Sandstrom* and *Francis,* the error in this case was harmless. *See Rose v. Clark,* 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). The overwhelming evidence against petitioner showed that he went to the Nelson home with Giles for the purpose of robbing them. He was armed with a gun and, when the gun proved unusable, he stabbed the Nelsons multiple times with a butcher knife retrieved from their kitchen. There can be no reasonable doubt that petitioner acted with the requisite malice, that is, recognition that he acted without legal justification or extenuation. As the malice instruction constituted harmless error, counsel's failure to object to it does not undermine confidence in the outcome of petitioner's trial; his trial remained fundamentally fair, despite this error. Thus, without prejudice, there was no ineffective assistance of counsel, and petitioner is not entitled to relief on this claim.

District Court Record Vol. 2, Tab 27, p. 85-87.

We agree with the district court that trial counsel did not render ineffective assistance by failing to object to the jury charge on malice. The trial court's charge on malice meant an intentional killing. As the state appellate court noted, "the predicate fact supporting the presumption is Jones's intentional and unlawful killings of the victims." *Jones*, 753 So.2d at 1188. Furthermore, even if the instruction was error, any error was harmless in light of the overwhelming evidence of Jones's guilt. *See Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986).

In *Yates v. Evatt*, 500 U.S. 391, 111 S.Ct. 1884, 1892, 114 L.Ed.2d 432 (1991), the Supreme Court described the nature of the harmless error analysis which must be applied to *Sandstrom* errors:

> To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. Thus, to say that an instruction to apply an unconstitutional presumption did not contribute to the verdict is to make a judgment about the significance of the presumption to reasonable jurors, when measured against the other evidence considered by those jurors independently of the presumption.

111 S.Ct. at 1893.[2] The Court then set forth two distinct steps for the reviewing court to follow in performing this analysis: first, the court must analyze the jury instructions, applying the customary presumption that jurors follow instructions; second, the court must weigh the

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[2] We acknowledge that the Supreme Court has disapproved of some of the *Yates* language, but the *Yates* harmless error analysis remains applicable. *See Stevens v. Zant*, 968 F.2d 1076, 1086 n. 12 (11th Cir.1992).

probative force of the evidence actually considered by the jury against the probative force of the presumption standing alone. *Id.* The Court then noted that conclusions of harmless error are not appropriate simply because there is overwhelming evidence of the defendant's guilt. This overwhelming evidence must have been considered by the jury. Thus, a reviewing court must determine "whether the force of the evidence presumably considered by the jury in accordance with the instructions is so overwhelming as to leave it beyond reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption." *Id.* at 1893-94.

Weighing the probative force of the evidence of guilt against the probative force of the presumption standing alone, there is no doubt in our minds that the verdict resting on that evidence would have been the same in the absence of the presumption. *See id.* The jury considered the testimony of the surviving victims, and Jones's confession to his participation in the crimes. Jones acknowledged that he went to the Nelsons' home armed with a gun with the intent to rob the victims. Jones admitted that he stabbed the victims multiple times with a butcher knife. Jones also acknowledged that one of the children begged him to stop, and that the female victim moved before he stabbed her. There can be no doubt that "the verdict resting on [this] evidence would have been the same in the absence of the presumption." *Id.* at 405, 111 S.Ct. at 1893-94.

Therefore, we conclude that Jones cannot establish that his counsel were deficient for failing to object to the trial court's instruction or that counsels' failure to object to the instruction undermined confidence in the outcome of his trial. Accordingly, Jones is not entitled to relief on this claim of ineffective assistance of counsel.

C. *Appellate counsel*

The district court included within the COA the issue of whether Jones received ineffective assistance of appellate counsel because counsel failed to raise on appeal a challenge to trial counsels' failure to object to the trial court's malice instruction. Neither Jones nor the State briefed this issue or argued it before the court. Thus, we deem the argument abandoned. *See Marek v. Singletary*, 62 F.3d 1295, 1298 n. 2 (11th Cir.1995) ("Issues not clearly raised in the briefs are considered abandoned."); *see also Access Now, Inc. v. Southwest Airlines, Co.*, 385 F.3d 1324, 1330 (11th Cir.2004) ("If an argument is not fully briefed (let alone not presented at all) to the Circuit Court, evaluating its merits would be improper both because the appellants may control the issues they raise on appeal and because the appellee would have no opportunity to respond to it.").

However, even if we considered the issue, we would not grant Jones relief on this claim. As we stated previously, Jones's trial counsel were not ineffective in failing to object to the malice jury instruction. Thus, it is *a fortiori* that Jones's appellate counsel was not ineffective in failing to raise the issue on appeal.

D. *Racial animus*

Jones contends that Boles harbored racial animosity toward him that infected his entire representation of Jones and deprived Jones of his Sixth Amendment right to effective assistance of counsel. Our review of the record indicates that Jones did not raise this claim as a specific, enumerated claim of ineffective assistance of counsel in his federal habeas petition. Instead, he referenced the issue in the introductory portion of his fed-

eral habeas petition. Additionally, Jones did not raise this as an enumerated claim of ineffectiveness in state court in his Rule 32 petition. Rather, during the Rule 32 hearing, Jones presented testimony from Ann Graham, the legal secretary for Jones's post-conviction counsel, that Boles told her in a phone conversation something to the effect of "that nigger is going to fry." R. Vol. 2, p. 378. In his "Proposed Findings of Fact and Conclusions of Laws" filed on May 14, 1996, after the trial court conducted the Rule 32 hearing, Jones stated that "[i]n addition, attorney Boles' general racial attitudes and, specifically, his racial attitudes as to his client, the Petitioner, fatally impaired his ability to provide effective assistance of counsel." R. Vol. 4, p. 233. On appeal of the trial court's denial of his motion for post-conviction relief, Jones asserted that "the root of his ineffective-assistance-of-counsel claims is what he says are Boles's racist views." *See Jones*, 753 So.2d at 1182.

These general references to a "claim" of ineffectiveness based on Boles's alleged racial animosity do not fairly present the claim to the courts. Although Jones presented limited testimony on this allegation in his Rule 32 proceeding, mentioned it briefly in his post-Rule 32 filings, and noted the allegation in his introductory and conclusory portions of his state appellate brief, there is absolutely no discussion by any state court of the allegation. The state trial court did not address it in its Rule 32 order because Jones did not raise the allegation in his Rule 32 petition. Nor did the state appellate court review the merits of this "claim" because Jones did not raise it as a discrete claim of ineffective assistance of counsel on appeal from the trial court's denial of his Rule 32 petition. Rather, the state appellate court made one statement mentioning Jones's assertion that the root of his ineffectiveness claims was Boles's racial animosity.

Because this "claim" was not fairly presented to the state courts, it is procedurally defaulted, *see Picard v. Connor,* 404 U.S. 270, 275, 92 S.Ct. 509, 512, 30 L.Ed.2d 438 (1971), and we will not consider it. *See Teague v. Lane,* 489 U.S. 288, 297-98, 109 S.Ct. 1060, 1068-69, 103 L.Ed.2d 334 (1989).

A petitioner may obtain federal review of a procedurally defaulted claim if he can show both cause for the default and actual prejudice resulting from the default. *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Additionally, in extraordinary cases, a federal court may grant a habeas petition without a showing of cause and prejudice to correct a fundamental miscarriage of justice. *See Murray v. Carrier,* 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986). Jones has not attempted to meet either exception.

Furthermore, we decline to consider the merits of this claim because Jones did not clearly present this issue to the district court as a specific, enumerated claim of ineffective assistance of counsel. As a general rule, we will not address issues or arguments on appeal that were not fairly presented to the district court. *Depree v. Thomas,* 946 F.2d 784, 793 (11th Cir.1991).

Assuming the issue was properly before us for consideration, we would conclude that the claim is without merit. Boles's alleged racial remarks occurred almost 13 years after Jones's trial. Jones did not present any evidence that Boles made any racist statements to Jones during his representation. There is no evidence that Boles ever made a derogatory racial remark to Jones. The alleged racial remark was made to a legal secretary, not to Jones, and the alleged comment was made after Boles's representation of Jones. There is no evidence to support Jones's allegation that Boles's alleged racist attitude toward him affected Boles's representation to the

extent that Jones was denied the right to counsel guaranteed by the Sixth Amendment. Accordingly, Jones is not entitled to relief on this claim.

V. CONCLUSION.[3]

Jones has not shown that his counsel rendered ineffective assistance to him at either his trial or sentencing. Jones cannot establish that in light of all the circumstances, his counsels' performance was outside the wide range of professional competence. Jones also cannot establish that his counsels' alleged deficient performance prejudiced the outcome of his trial or sentencing. Accordingly, we affirm the district court's judgment denying Jones habeas relief.

AFFIRMED.

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[3] We note that in addition to his request for relief from his conviction and sentence, Jones urges this court to remand his case with directions that the district court conduct an evidentiary hearing on his mental health claims. Jones is not entitled to an evidentiary hearing because he had ample opportunity to develop the factual basis of this claim in state court. *See* 28 U.S.C. § 2254(e)(2); *see also Kelley v. Sec'y Dep't of Corr.*, 377 F.3d 1317, 1337 (11th Cir.2004).

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No. CV 00–J–3608-S

AARON LEE JONES,

Petitioner,

—VS.—

DONAL CAMPBELL[1], Commissioner of the Alabama Department of Corrections, and the ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents.

MEMORANDUM OPINION

This is an action by an Alabama state prisoner pursuant to 28 U.S.C. § 2254, challenging the constitutional validity of the conviction he received in the Blount County Circuit Court on December 10, 1982, for capital murder, for which he was sentenced to death. The petitioner, Aaron Lee Jones, with the assistance of an attor-

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[1] The court judicially knows that, during the pendency of this case, Danal Campbell replaced Joe Hopper as the Commissioner of the Alabama Department of Corrections. Consequently, Mr. Campbell is hereby substituted for Mr. Hopper.

ney, filed the instant petition for writ of habeas corpus on December 15, 2000. He is incarcerated at Donaldson Correctional Facility in Bessemer, Alabama.

I. PROCEDURAL HISTORY

On June 28, 1979, the petitioner and a co-defendant, Arthur Lee Giles, were charged with capital murder in the stabbing and shooting deaths of Carl and Willene Nelson. Jones was convicted on July 28, 1979, after a jury trial, of capital murder. He was represented pre-trial by Thomas L. Roundtree, who was appointed by the court. A few days before trial began, Jones employed Jack G. Davis to represent him. Accordingly, Roundtree sought to withdraw on July 23, 1979, and Davis sought a continuance in order to allow counsel time to prepare for trial. The court denied the motion to continue, and denied Roundtree's motion to withdraw, instructing Roundtree and Davis to "cooperate in the preparation and presentation" of the defense. Lee Butcher, a lawyer in practice with Davis, also filed an appearance on July 25, 1979. On July 28, 1979, a jury found Jones guilty of capital murder and fixed his punishment at death. The trial judge entered an order imposing the death penalty on August 17, 1979.

Petitioner sought to have Davis and Butcher appointed as his counsel on appeal, but the court denied the motion, finding that neither of the attorneys had practiced criminal law for five years. The court appointed Roundtree to represent Jones in his appeal to the Alabama Court of Criminal Appeals. The Alabama Court of Criminal Appeals remanded the case for a new trial on the basis of *Beck v. Alabama*, 447 U.S. 625 (1980), and *Ritter v. State*, 403 So. 2d 154 (Ala. 1981), determining that petitioner was entitled to a new trial in light

of Supreme Court precedent that a jury in a capital case must be given an option of finding the defendant guilty of a lesser included non-capital offense. *Jones v. State*, 403 So. 2d 1 (Ala. Crim. App. 1981).

Petitioner was re-tried in accordance with the procedures outlined in *Beck*, and was again convicted on December 10, 1982. He was represented at trial by Davis and George M. Boles.[2] After a separate sentencing phase of trial, the jury recommended a sentence of death by electrocution. The judge then conducted a sentencing hearing on aggravating and mitigating circumstances, and entered an order imposing the death penalty on December 28, 1982.

The evidence presented at the 1982 trial was summarized by the Alabama Court of Criminal Appeals as follows:

> Tony Nelson testified that on the morning of November 10, 1978, he was sleeping with his ten-year-old brother, Charlie, in one of the bedrooms of his parents' home in the Rosa community in rural Blount County, Alabama. His thirteen-year-old sister, Brenda, was sleeping with their parents, Willene and Carl Nelson, in another bedroom. Tony's grandmother was sleeping by herself in a third bedroom of the home.
>
> At 3:27 a.m. Tony was awakened by a disturbance inside the home. When the light in his bedroom was turned on, he saw Arthur Lee

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[2] Mr. Boles had been practicing law since 1968—so in 1982, at petitioner's second trial, he had been practicing 14 years—and had criminal case experience through his work with the District Attorney's office. (R. 32 at 56). It is also noteworthy that petitioner originally retained Mr. Davis. (R. at 121-22).

Giles, a former employee of his father, standing in the doorway of Tony's bedroom. Tony's father appeared and asked Giles to leave. Tony got out of bed and followed Giles to make sure Giles left as directed. As Tony stepped out the back door of the home Giles shouted "here," and shot him twice, once in the neck and once in the chest. Giles, then, re-entered the Nelsons' home. Tony made an effort to go and get a gun, but was unable to do so due to his injuries. Instead, he crawled to, and hid under, his father's truck. Shortly, thereafter, he heard Giles and another man exit his parents' home. He saw the men only from the waist down. He heard one of them say that they needed to find Tony and that the other man should "get the money." After they left, Tony went back inside. In his parents' bedroom he found his mother, his father, his sister, and his brother. All four had been severely wounded and there was blood all over them. Charlie and Brenda responded when Tony asked if anyone was still alive. His parents were dead. Tony rushed Brenda and Charlie to the hospital where all three, including Tony, were treated for their wounds.

Charlie Nelson testified that he saw Giles when his father, Carl Nelson, asked Giles to leave the home. He saw Tony leave and heard two gunshots. Giles, then, reappeared and shot Charlie's grandmother, who was standing in the doorway to Charlie's bedroom. Giles proceeded to Charlie's parents' bedroom from where Charlie heard more gunshots. Charlie ran to his parents' bedroom, where he saw Giles and

another man, whom he positively identified at trial as the appellant. He realized that his mother, his father and his sister had all been shot. He jumped on top of his sister to protect her from further harm. As he lay there, he saw the appellant stab his mother and father with a knife. His mother and father were both moaning as the appellant repeatedly stabbed them. The appellant turned and stabbed Charlie's sister Brenda, who had already been shot above one eye. Charlie was hit in the head several times, after which the appellant stabbed him twice in the back.

On cross-examination Charlie admitted that during appellant's first trial Charlie had stated that Giles and the appellant appeared to be drunk. He also stated that Giles "ordered the appellant around" and directed the appellant to stab his victims.

Brenda Nelson confirmed those parts of Tony's and Charlie's testimony as to things she had witnessed. She identified the appellant at trial as the man she saw repeatedly stabbing her mother. She stated that Giles was the one that shot her, Brenda, in the head.

Dr. Joseph Embry of the Alabama Department of Forensic Science testified that Willene Nelson died from multiple stab wounds that damaged her heart, lungs, and kidneys. Her body received 29 knife wounds (17 stab wounds and 12 slash wounds), numerous lacerations and abrasions about the head from a blunt instrument, and one gunshot wound to the left shoulder. Dr. Embry testified that Carl Nelson died

from a combination of gunshot wounds and stab wounds. He was shot once through the heart and once in the left arm. He was stabbed, approximately, eight times, including a stab wound in the neck which severed his spinal cord. He also received numerous blunt instrument abrasions about the head. Dr. Embry testified that Carl Nelson was alive when he was stabbed in the neck.

Billy Irvin, an investigator with the Blount County Sheriff's Department, testified that he interviewed the appellant at 8:15 a.m. on November 11, 1978. During this interrogation the appellant confessed to his participation in the events at the Nelsons' home the previous night. Appellant's confession was tape recorded and transcribed. The appellant reviewed the transcript of his confession and signed it, voluntarily. After the trial court conducted a hearing and determined that appellant's confession was, indeed, voluntary, Irvin was permitted to read it to the jury.

In appellant's statement, he admitted participating in the activities that resulted in the deaths of Willene and Carl Nelson. According to the appellant, although they never found any money, he and Giles went to the Nelsons' home to rob Carl Nelson. Giles had told the appellant that Carl Nelson had not sufficiently paid Giles for work Giles had done for Nelson in the past. Giles and the appellant had been drinking rum and beer prior to their trip to the Nelsons' home. They were both armed with .32 caliber pistols, but appellant's pistol would not fire at

the Nelsons' home because he lost the firing pin. The appellant's statement confirmed the gruesome details of the attack on the Nelson family. He stated that by the time he entered the back bedroom, Giles had already shot and stabbed "everyone." In his own words the appellant stated:

> "I goes off in the other room where he [Giles] at . . . shot and stabbed them all there, you know, the kids and . . . he looks at me and tells me, you know, that I had to do something and I told him that I didn't have a knife so he gave me one and I cut the mother and another man and cut the boy and that's all I did."

The appellant further stated that he used a butcher knife that Giles had, apparently, obtained from inside the Nelsons' home. He also said that the "little girl" at one point begged him not to do it, and that the "woman" moved right before he stabbed her. The appellant explained that when he stabbed the "woman" he "really was just so gone, I just closed my eyes" and stabbed wildly.

Jones v. State, 520 So. 2d 543, 545–546 (Ala. Crim. App. 1984), *aff'd* 520 So. 2d 553 (Ala. 1988).

Petitioner appealed the 1982 conviction to the Alabama Court of Criminal Appeals, where he was represented by Boles. He raised the following issues:

> (1) Whether defendant was improperly denied a hearing on his request for change of venue;
>
> (2) Whether the court erred in refusing to strike a juror who stated that she could not be sure

> that she would adhere to and vote her own conviction as to guilt or punishment if all other jurors voted differently; and
>
> (3) Whether the court improperly admitted evidence of a prior conviction of a crime of violence through a certified copy of another county's Circuit Court docket sheet.

The Alabama Court of Criminal Appeals affirmed the conviction on January 10, 1984, after addressing the issues on the merits, but remanded for a written sentencing order stating findings relating to mitigating circumstances. *Jones v. State*, 520 So. 2d 543 (Ala. Crim. App. 1984). Jones sought rehearing in the appellate court, which was denied on December 9, 1986. Jones then sought *certiorari* in the Alabama Supreme Court, asserting:

> (1) that the trial court on remand refused to consider certain mitigating circumstances;
>
> (2) that the trial court erred in failing to strike the juror; and
>
> (3) that the evidence of prior convictions was improperly admitted.

The Alabama Supreme Court affirmed on January 8, 1988. *Ex parte Jones*, 520 So. 2d 553 (Ala. 1988). Jones sought rehearing, which was denied on February 12, 1988. Petitioner sought *certiorari* review in the United States Supreme Court, asserting that:

> (1) the sentencing hearing placed the petitioner in the position that he was forced to waive either his constitutional right against self-

incrimination or his right to confront witnesses against him; and

(2) the court's instructions to the jury regarding the possibility of imposing a sentence other than death were unconstitutionally vague.

The Supreme Court denied *certiorari* on October 3, 1988. *Jones v. Alabama*, 488 U.S. 871, 109 S.Ct. 182, 102 L.Ed. 2d 151 (1988).

Petitioner filed a motion for post-conviction relief pursuant to Temporary Rule 20[3] of the Alabama Rules of Criminal Procedure in the trial court on or about March 6, 1990, alleging[4]:

(1) That he received ineffective assistance of counsel in that his attorneys at trial:

(a) failed to investigate his mental health problems, including intelligence levels and drug and alcohol abuse;

(b) failed to adequately investigate and research the racial composition of Blount County in that he was a black defendant charged with murders of white victims in a mostly white county;

(c) failed to seek and present evidence supporting a motion for change of venue;

(d) failed to conduct an adequate voir dire so as to identify biased jurors;

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[3] Temporary Rule 20 was the predecessor to the present Rule 32 of the Alabama Rules of Criminal Procedure.

[4] The court has re-numbered petitioner's Rule 32 Claims to group them in a logical fashion. References hereinafter are made to the court's re-numbered claims, rather than the numbering of the claims in the Rule 32 petition.

(e) failed to investigate and challenge the constitutional validity of a statement obtained from the defendant;

(f) failed to have transcribed several bench conferences relating to defendant's substantive rights;

(g) failed to investigate and adequately cross-examine state witnesses;

(h) failed to object to improper closing argument by the prosecution at both the guilt and penalty phase of the trial and to other prosecutorial "misconduct";

(i) failed to object to the court's improper burden-shifting instructions, discriminatory jury selection, hearsay evidence, and other improper and prejudicial testimony and/or argument;

(j) failed to adequately prepare for the penalty phase by failing to call witnesses and introduce evidence of mitigating circumstances;

(k) failed to defend against allegations of aggravating circumstances presented by the prosecution;

(l) failed to object to prejudicial and misleading comments made by the prosecutor to the jury during the penalty phase in that the prosecutor referred to the defendant as a "blood-thirsty savage," misstated the evidence, misstated the law regarding the death sentence, and made improper pleas in favor of the death penalty;

(m) failed to object to improper comments relating to the victim impact statements and the worth of the victims;

(n) failed to present any evidence during the final sentencing hearing;

(o) failed to adequately challenge the under-representation of blacks, women, and other groups in the jury pool from which the grand and petit jurors were selected;

(p) failed to adequately prepare, investigate, or defend petitioner;

(q) failed to provide effective assistance on appeal by raising the issues presented in the post-conviction petition;

(2) he was denied a fair trial by the under-representation of blacks, women, and other groups from the jury pool from which the grand and petit jurors were selected;

(3) he was denied a fair trial by the prosecutor's improper use of peremptory challenges on the basis of race;

(4) he was denied a fair trial because his motion for change of venue was denied and the jury was biased by the pre-trial publicity in Blount County;

(5) the court erred in failing to adequately instruct the jury on the lesser included offenses of murder in the first degree and murder in the second degree;

(6) the court erred in giving an instruction on "intent" and "malice" that improperly shifted the burden to the defendant;

(7) he was denied a fair trial in that the prosecutor made improper, inflammatory, and prejudicial comments to the jury about the worth of the victim in closing arguments of both the guilt and penalty phases;

(8) the trial and appellate courts improperly refused to consider mitigating circumstances; and

(9) Alabama's death penalty is arbitrarily and discriminatorily applied on the basis of race in violation of the Eighth and Fourteenth Amendments.

On November 13, 1995, Jones amended the state court post-conviction petition to re-state and add the following claims:

(10) that he received in effective [sic] assistance of counsel at trial in that his attorneys:

(a) failed to offer testimony of any friends or family members who would have testified at the penalty phase as to mitigating circumstances;

(b) called only one witness, the defendant, during the penalty phase and then elicited only harmful testimony;

(c) failed to investigate defendant's mental history in order to prepare evidence that defendant was a "hapless follower" of the co-defendant;

(d) failed to attack the credibility of the confession made by the defendant by showing that he was prone to take responsibility for things he did not do;

(e) failed to present evidence at sentencing regarding Jones' history of child abuse and neglect;

(f) failed to offer evidence that Jones had been a productive citizen and a non-violent and helpful person during extended periods of his life;

(g) failed to present evidence that the victims already were dead when Jones inflicted any wounds;

(h) failed to present evidence refuting the appropriateness of the death penalty, including health and school records of the defendant;

(i) failed to argue to the jury that Jones cooperated with the police during the investigation;

(j) failed to elicit from Jones during the sentencing phase any testimony showing remorse for his actions;

(k) abandoned the defense of the defendant during the sentencing phase;

(l) failed to investigate the crime scene to find any exculpatory evidence relating to the wounds (as to whether victims were dead when stabbed by the defendant) and to the layout of the house, which may have

cast doubt on the version of events presented by the prosecution witnesses;

(m) failed to develop and present a defense strategy relating to defendant's role as a mere "follower" of the co-defendant;

(n) failed to conduct a survey to demonstrate the prejudice caused by pre-trial publicity so as to support the motion for change of venue;

(o) failed to seek appropriate assistance of expert witnesses, such as psychologists, pathologist, and mental health professionals;

(p) failed to seek funds with which to retain a private investigator who could research the crimes of the co-defendant to show that defendant was a mere "follower";

(q) improperly requested funds for expert consultation in the presence of the prosecution; thereby revealing defense strategy before trial;

(r) appeared to concede defendant's guilt by failing to mount a vigorous presentation to show the jury that defendant did not kill the victims;

(s) failed to adequately support and pursue a motion for a change of venue;

(t) failed to seek to conduct voir dire of the jury venire on an individual basis instead of in groups of 10;

(u) failed to adequately investigate and research the racial composition of Blount County;

(v) failed to challenge the under-representation of blacks, women and other groups from the jury pool;

(w) failed to effectively conduct voir dire so as to identify jurors who were biased;

(x) failed to move for a jury instruction on the charge of manslaughter;

(y) failed to note for the record the race of venire members who were struck from the jury;

(z) improperly waived the right to a sequestered jury by withdrawing the motion for sequestration;

(aa) failed to object to the lack of a jury instruction on accomplice testimony and the distinction between murder and capital murder;

(bb) failed to object to improper and prejudicial jury verdict forms;

(cc) failed to preserve the record by failing to have bench conferences transcribed;

(dd) failed to adequately investigate and cross-examine state witnesses, including Tony Nelson, Brenda Nelson, Charlie Nelson, and the police officers who took defendant's confession;

(ee) failed to object to prosecutor's use of the phrase "blood-thirsty savage" and

"blood-thirsty murderer" and to the prosecutor's improper comment about defendant's silence;

(ff) failed to object to the court's "burden-shifting" instructions given on the elements of "intent" and "malice";

(gg) failed to object to court's jury instruction that allowed finding of guilt without a finding of a particularized intent to kill;

(hh) failed to make the following motions:

(i) for a directed verdict;
(ii) for a new trial;
(iii) for entire recordation;
(iv) for a charge conference;
(v) to view the crime scene; and
(vi) to disclose all impeachment or exculpatory testimony;

(ii) failed to poll the jury members after the verdict at the guilt phase;

(jj) failed to prepare or defend against the evidence offered in the penalty phase relating to defendant's prior conviction for murder;

(kk) failed to function as an advocate during the penalty phase;

(ll) failed to present mitigating evidence showing the culpability of the co-defendant and his control over the defendant;

(mm) failed to argue to the jury at the penalty phase that:

(i) defendant was a victim of violence and neglect as a child;
(ii) defendant suffered from mental problems and drug and alcohol dependency; and that
(iii) defendant had been non-violent and helpful in the community;

(nn) failed to object to the admission of the presentence investigation report, which included hearsay and prejudicial statements;

(oo) failed to object to the use of electrocution as a means of punishment in violation of the Eighth and Fourteenth Amendments;

(pp) failed to object to prejudicial statements made by the prosecutor to the jury, referring to the defendant as a "blood-thirsty savage" and a "blood-thirsty murderer";

(qq) failed to object to prosecutor's comments on victim and family impact and the worth of the victims;

(rr) failed to make use of any jury questionnaire;

(ss) prejudiced defendant by informing the court that the State had offered a plea bargain;

(11) that he received ineffective assistance of counsel on appeal in that his attorney:

(a) informed the trial judge that he agreed with the trial court's rulings and saw no

merit in any appellate issue, then filed an inadequate and ineffective brief, thereby waiving issues that could have been appealed;

(b) failed to raise issues readily apparent on the record, including the issues raised in the post-conviction petition;

(c) failed to object to the absence of meaningful appellate review of death sentences imposed in Alabama;

(12) that he was denied effective assistance of counsel at trial and on appeal because of the State's inadequate compensation of defense attorneys in capital cases;

(13) that he was denied a fair trial by an impartial jury because the trial court failed to grant a change of venue;

(14) the trial court erred in failing to adequately instruct the jury on the distinction between capital murder and the other degrees of murder at both the guilt and penalty phases of the trial;

(15) the trial court erred in instructing the jury on "intent" and "malice" in that his instruction shifted the burden to the defendant and violated due process;

(16) the trial and appellate courts failed to consider mitigating evidence that was clear from the record;

(17) defendant was denied a fair appeal by the court's failure to transcribe all proceedings and

to preserve and secure all physical evidence and trial exhibits;

(18) defendant was denied a fair trial and fair sentencing hearing in that the court refused to provide funds for expert assistance;

(19) the court erred by admitting into evidence over objection the statement of the defendant;

(20) the court erred in failing to hold a hearing concerning defendant's competency to stand trial;

(21) the court erred in admitting into evidence inflammatory and prejudicial photographs of the victims;

(22) the court erred in allowing the prosecutor to ask improper questions of witnesses and make inappropriate remarks to the jury;

(23) the court erred in allowing the prosecutor to make inappropriate argument at closings in both the guilt and penalty phases regarding the worth of the victims;

(24) the evidence was insufficient to show that defendant had the requisite intent to kill;

(25) the death sentence was unconstitutionally imposed on the basis of racial bias;

(26) Alabama's death penalty statute violates the Sixth, Eighth, and Fourteenth Amendments and the Alabama Constitution by failing to provide meaningful comparative review for those sentenced to death;

(27) electrocution as a means of punishment violates the Eighth Amendment; and

(28) newly discovered evidence entitles defendant to post-conviction relief.

The court held a two-day evidentiary hearing on the Rule 32 petition. Jones filed a second amended Rule 32 petition on March 13, 1996, restating the claims previously asserted, and adding the following claims:

(29) that he was denied a fair trial in that a juror, J.D. Moss, failed to respond to a question about whether venire members knew any of the individuals, even though he did know Sheriff J.C. Carr and one of the victims; and

(30) that juror Moss improperly influenced other jury members by telling them that the defendant would be released from jail in a short time unless the jury imposed the death penalty.

The Rule 32 petition was denied on June 10, 1996, in an opinion drafted by the state, finding that 14 of petitioner's claims were procedurally barred because he failed to raise them at trial or on direct appeal, and that petitioner failed to meet his burden of proof as to the remaining claims of ineffective assistance of counsel, juror misconduct, and newly discovered evidence. Petitioner appealed the denial to the Alabama Court of Criminal Appeals, which affirmed by published opinion dated April 30, 1999. *Jones v. State*, 753 So. 2d 1174 (Ala. Crim. App. 1999). He sought rehearing, which was denied, and then sought *certiorari* in the Alabama Supreme Court, which was denied on December 17, 1999.

On December 15, 2000, the petitioner, represented by counsel, filed the instant petition for writ of *habeas corpus*, asserting:

(A) That he was denied effective assistance of counsel at trial and sentencing in that:

(1) his attorneys failed to make a reasonable investigation into possible defenses and mitigation (Pet. ¶¶ 35–38);

(2) the State of Alabama provided insufficient funding for the compensation of capital defense attorneys (Pet. ¶¶ 39–40);

(3) his attorneys failed to present any mitigating evidence (including petitioner's mental health history, evidence of the crime itself, petitioner's childhood history, and petitioner's history of substance abuse) at the sentencing phase of his trial (Pet. ¶¶ 41–58);

(4) his attorneys at sentencing failed to object to admission into evidence of the presentence report (Pet. ¶ 59);

(5) his attorneys failed to object to electrocution as a cruel and unusual means of punishment (Pet. ¶ 60);

(6) his attorneys at trial failed to object to misleading and prejudicial argument (including referring to the defendant as a "blood-thirsty savage" and a "blood-thirsty murderer") made by the prosecutor during the penalty phase (Pet. ¶ 61);

(7) his attorneys at sentencing failed to object to the prosecutor's improper comments relating to the victim and family member impact evidence (Pet. ¶ 62);

(8) his attorneys failed to adequately pursue a defense that the victims were already dead when the petitioner stabbed them (Pet. ¶¶ 64–69);

(9) his attorneys failed to object to the jury charge on accomplice liability (Pet. ¶¶ 70–76);

(10) his attorneys failed to request a jury charge on voluntary intoxication and manslaughter as a lesser-included offense (Pet. ¶¶ 77–81);

(11) his attorneys failed to object to the court's "burden-shifting" jury instruction on "malice" (Pet. ¶¶ 82–84);

(12) his attorneys failed to adequately seek and present evidence in support of a change of venue ((Pet. ¶ 85);

(13) his attorneys failed to adequately cross-examine state witnesses Tony Nelson, Charlie Nelson, Brenda Nelson, and the police officers who took petitioner's confession (Pet. ¶ 86);

(14) failed to object to improper comments by the prosecutor during closing arguments relating to petitioner's right not to testify (Pet. ¶¶ 87–88);

(B) That he received ineffective assistance of counsel on appeal in that his attorney on appeal raised meritless issues, while failing to raise all of the issues presented in the instant habeas action as well as the following "substantial issues" on appeal:

(1) the omission of a jury charge on intoxication and the lesser included offense of manslaughter;

(2) the omission of a jury charge explaining the requisite intent;

(3) the court's error in giving an instruction that improperly shifted the burden to the defendant (Pet. ¶¶ 89–97);

(C) That the trial and appellate courts failed to consider non-statutory mitigating circumstances (Pet. ¶¶ 98–99);

(D) That the trial court erred in failing to hold a hearing in accordance with Alabama Code § 15-16-21 regarding petitioner's competency to stand trial, and in accepting a report approved by Dr. Seger, who was later fired for use of bogus credentials (Pet. ¶¶ 100–106);

(E) That there was insufficient evidence to support a finding that the defendant had the requisite intent to kill as required in a capital murder (Pet. ¶¶ 107–110);

(F) That the sentence was imposed as part of a pattern of racial bias (Pet. ¶¶ 111–114);

(G) That the appellate court's practice of limiting proportionality review to death penalty cases fails to ensure even-handed and nonarbitrary application of the death penalty (Pet. ¶¶ 115–119);

(H) That the method of execution used by the state constitutes cruel and unusual punishment (Pet. ¶¶ 120–124);

(I) That Juror Moss failed to disclose during *voir dire* that he knew the sheriff and deputies involved in the trial, knew the victims, and was familiar with the victims' home (Pet. ¶¶ 125–127); and

(J) That Juror Moss told other jurors that petitioner would be released from prison in a few years unless the jury imposed the death penalty (Pet. ¶¶ 128–129);

On March 22, 2001, respondent filed an answer to the petition, asserting that some of the claims were without merit, and that some of the claims were procedurally defaulted. By order of June 4, 2001, the parties were notified that the petition would be considered for summary disposition, and the petitioner was notified of the provisions and consequences of this procedure under Rule 8 of the *Rules Governing § 2254 Cases*. On June 26, 2001, the petitioner filed a response to the order regarding summary disposition. On August 1, 2001, petitioner filed a motion for evidentiary hearing, supported by authority, and a brief in response to the answer. On August 20, 2001, the respondent filed a response to the motion for evidentiary hearing.

Ineffective Assistance of Counsel Claims

Petitioner advances fourteen specific claims of ineffective assistance by his trial attorneys, plus the general claim that his appellate counsel was ineffective for failing to raise on appeal each and every claim pled in the instant habeas petition together with three other "substantive" appeals issues. The state trial court conducted an evidentiary hearing that focused on many of these claims, which also were considered on appeal by the

Alabama Court of Criminal Appeals. *See Jones v. State*, 753 So. 2d 1174 (Ala. Crim. App.), *cert. denied*, (Ala. 1999).

To the extent that certain claims of ineffective assistance of counsel were not pled in the Rule 32 petition and are raised here for the first time, they are procedurally defaulted and cannot be considered on their merits. Claims not presented to the state courts and raised here for the first time are treated as unexhausted claims. However, because the limitation period for asserting such claims under Rule 32.2(c) has now expired, no state remedy remains for addressing them. Consequently, such claims, in fact, are exhausted and procedurally defaulted. *Collier v. Jones*, 910 F.2d 770 (11th Cir. 1990).

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the petitioner can obtain federal habeas relief on claims resolved on the merits by the state courts only if he shows that the Alabama Court of Criminal Appeals' adjudication of the ineffective-assistance claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2). *See Wiggins v. Smith*, 123 S.Ct. 2527, 2534, 156 L.Ed. 2d 471 (2003); *Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000); *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001). This standard of review is strict, and federal courts are required to give "greater deference to the determinations made by state courts than they were required to under the previous law." *Verser v. Nelson*, 980 F. Supp. 280, 283 (N.D. Ill. 1997) (quoting *Spreitzer v. Peters*, 114 F.3d 1435, 1441 (7th Cir. 1997)).

The state court determination of an issue will be sustained under § 2254(d)(1) unless it is "contrary" to clearly established, controlling Supreme Court law or is an "unreasonable application" of that law. These are two different inquiries, not to be confused. The Supreme Court has explained:

> Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "*contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "*involved an unreasonable application of* . . . clearly established Federal law, as determined by the Supreme Court of the United States." [Emphases added.]

Williams v. Taylor, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000). A state-court determination is "contrary" to clearly established Supreme Court law in either of two ways:

> First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Id. at 405. Likewise, a state-court determination can be an "unreasonable application" of clearly established Supreme Court law in two ways:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id. at 407; *see Putman v. Head*, 268 F.3d 1223 (11th Cir. 2001). Whether the application is "reasonable" turns not on subjective factors, but on whether it was "objectively unreasonable." *See Wiggins v. Smith*, 123 S.Ct. 2527, 2535, 156 L.Ed. 2d 471 (2003). The question is not whether the state court "correctly" decided the issue, but whether its determination was "reasonable," even if incorrect. *Id.*

The Supreme Court's clearly established standard for assessing claims of ineffective assistance of counsel is found in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). *Wiggins, supra*, at 2535. The United States Supreme Court has established a national standard for judging the effectiveness of criminal defense counsel under the Sixth Amendment. "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial can-

not be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984). The Court elaborated:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687.

In order to show ineffectiveness of counsel, the movant must demonstrate that his attorney's performance fell below "an objective standard of reasonableness," 466 U.S. at 688, and that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Also, in making such an evaluation, "the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." 466 U.S. at 690. The effectiveness or ineffectiveness must be evaluated by consideration of the totality of the circumstances. *Stanley v. Zant*, 697 F.2d 955, 962 (11th Cir. 1983). The court must remember that a defendant in a criminal case has a constitutional right only to adequate counsel; he is not entitled to

the very best legal representation. *Stone v. Dugger*, 837 F.2d 1477 (11th Cir. 1988).

The second requisite element in a claim of ineffective assistance of counsel is a showing of prejudice. Even if counsel made an error so egregious as to be outside the broad scope of competence expected of attorneys, a movant can obtain relief only if the error caused actual prejudice to the defendant. *See Strickland v. Washington*, *supra*. Prejudice means a reasonable probability that the outcome of the proceeding would have been different had the errors not occurred. "When evaluating this probability, 'a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury.' " *Brownlee v. Haley*, 306 F.3d 1043, 1060 (11th Cir. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 695, 104 S.Ct. 2052, 2069, 80 L.Ed. 2d 674 (1984)). The court of appeals has explained:

> Significantly, although a petitioner must show that counsel's errors had more than "some conceivable effect on the outcome of the proceeding," the Supreme Court has said that a petitioner is *not* required to show that "counsel's deficient conduct more likely than not altered the outcome in the case." Rather, as the Supreme Court has held, "the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."

Hall v. Head, 310 F.3d 683, 694–695 (11th Cir. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984)). A "reasonable probability" is one that undermines confidence in the outcome of the proceeding. Nonetheless, the court of appeals has stated that "The petitioner's burden of

demonstrating prejudice is high," *Wellington v. Moore*, 314 F.3d 1256, 1260 (11th Cir. 2002), and that "this standard is difficult to meet." *Brownlee v. Haley*, 306 F.3d 1043, 1059 (11th Cir. 2002); *Johnson v. Alabama*, 256 F.3d 1156, 1177 (11th Cir. 2001). The reason the burden is so difficult lies in the fact that errors are made in every case, but it is only those errors that affect the fundamental fairness of the proceeding that rise to the level of prejudice under the ineffectiveness standard. The Eleventh Circuit stated, as follows:

> A finding of prejudice requires proof of "unprofessional errors' so egregious 'that the trial was rendered unfair and the verdict rendered suspect.' " *Eddmonds v. Peters*, 93 F.3d 1307, 1313 (7th Cir. 1996)(quoting *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S.Ct. 2574, 2582, 91 L.Ed. 2d 305 (1986)). As we recently explained, "habeas petitioners must affirmatively prove prejudice because '[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial.' '[T]hat the error had some conceivable effect on the outcome of the proceeding' is insufficient to show prejudice." *Gilreath v. Head*, 234 F.3d 547, 551 (11th Cir. 2000) (quoting *Strickland*).

Johnson v. Alabama, 256 F.3d 1156, 1177 (11th Cir. 2001). Moreover, the court of appeals has cautioned:

> The petitioner bears the burden of proof on the "performance" prong as well as the "prejudice" prong of a *Strickland* claim, and both prongs must be proved to prevail. The *Strickland* test is not easily met; as we have said, "the cases in which habeas petitioners can properly prevail

> on the ground of ineffective assistance of counsel are 'few and far between.'" *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir. 1995) (en banc) (citation omitted).

Johnson v. Alabama, 256 F.3d 1156, 1176 (11th Cir. 2001).

Applying these standards, the court will examine each of petitioner's allegations of ineffective assistance of counsel.

1. Habeas Claim A(1) (Failure to Make Reasonable Investigation)—Petitioner's first claim, found at paragraphs 35 through 38 of the petition, alleges in vague and conclusory terms that his trial attorneys failed to undertake a reasonable investigation into possible defenses and mitigation. Without identifying any particular errors by counsel, this claim emphasizes the "cumulative" impact of all errors by counsel which are alleged as separate grounds for relief at other places in the petition. In his August 1, 2001, brief in support of the petition, he argues that trial counsel failed to reasonably investigate the petitioner's mental health history, his abusive family history, and whether one or both of the victims were already dead when petitioner stabbed them. (*See* Court Doc. 22, pp. 15–17). Citing *Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000), he argues that the alleged failure of counsel to conduct a reasonable investigation into the crime and potential mitigation evidence is *per se* prejudicial and ineffective assistance.

Petitioner alleged several versions of this claim in his Rule 32 petition. At Rule 32 Claim 1(a), he asserted that counsel failed to adequately investigate his history of mental health and drug and alcohol problems. *See also* Rule 32 Claims 10(c) and 10(o). More generally, at Rule

32 Claim 1(p), he alleged that counsel failed to adequately prepare, investigate, and defend him at trial. Additional claims pled in the Rule 32 petition focus on the failure of counsel to *present* (as distinct from investigate) evidence of mental health problems, drug and alcohol abuse, childhood neglect and abuse, and whether the victims were alive when he stabbed them. *See* Rule 32 Claims 10(a), 10(e), 10(f), 10(h), 10(l), 10(dd), and 10(ll).

After a hearing, the Alabama state courts made findings of fact, both explicit and implicit in regards to the general allegation that counsel failed to conduct a reasonable investigation. The Alabama Court of Criminal Appeals stated those findings as follows:

> The trial court found as follows with regard to this claim:
>
> > "Jack Davis participated in the first trial and was co-counsel to Mr. Roundtree. Having participated in the prior trial, Davis was intimately acquainted with all the facts, circumstances, and evidence necessary to adequately represent Jones in 1982. At trial in 1982, Davis and Boles presented a reasonable, coherent defense of Jones. It is evident from the record that Jones denied any involvement in the murders. Instead, he claimed that he was present but did not inflict any knife wounds or gunshot wounds to the victims. The State's case depended upon the statements of the Nelson children who were surviving victims, and the confession of Jones. Boles aggressively attacked the witnesses' versions of events. Counsel impeached Brenda Nelson

with prior inconsistent statements that she had made. In fact, counsel had admitted prior inconsistent statements over the objections of the State and prevented the State from admitting into evidence the entirety of her statements. Counsel also vigorously opposed the admission of Jones's confession during the hearing on their motion to suppress and during the testimony of the State's witnesses before the jury. Review of Mr. Davis's and Mr. Boles's examination of witnesses at trial confirms that both trial counsel were well prepared and were knowledgeable of all the facts and circumstances of the crime.

"Petitioner now, in [a] Rule 32 [petition], presents a different defense theory and strategy to this Court. That strategy and defense is that Jones was at the scene of the murder, was asked to enter the house after the co-defendant Giles had shot and stabbed the victims, and that Jones, at Giles's command, stabbed the victims. Although he stabbed the victims, petitioner now claims that evidence shows that Carl and Willene Nelson were deceased at the time he inflicted the wounds on their bodies; therefore, this is evidence of Jones's lack of intent to commit murder. The presentation of this new theory is no more than second-guessing trial counsel's performance after petitioner's conviction and adverse sentence when the defense at trial proved to be unsuccessful. This is the situation of which *Strickland* warned.

"Under the circumstances, and evaluating the conduct of counsel and their perspective at the time of the challenged conduct, it is clear, based upon the first trial and the statements of Jones during his sentencing in the first case (CR 27, 28, 30, 31), that Jones was denying that he inflicted any wounds whatsoever on the victims. It is clear from his statements to the trial court concerning his attorney that this was his plea and that he was dissatisfied with his attorney, Mr. Roundtree, for trying to present a mental health defense. The record also shows that petitioner alleged that his confession was only made because of promises made by the sheriff's department concerning bond and that the statement was not true but that he was coerced into making it. It would have been unreasonable for counsel to argue before the jury the alternative, contradictory theory that petitioner now presents before this Court.

"Under the circumstances that existed at the time of trial, counsel could not have presented the defense not offered, and therefore was not ineffective for not developing the strategy concerning the timing of the fatal blows and the blows that petitioner now argues that he did inflict. Trial counsel had the benefit of hindsight from the first trial in which to prepare and try the 1982 case for petitioner. This Court, however, may not indulge in hindsight in its scrutiny of trial counsel's conduct."

(C.R. 1044–46.)

> The trial court's findings, which are supported by the record, indicate that it understood Jones's defense at trial and that counsel, in light of their knowledge at the time of trial, presented a vigorous defense. As the trial court correctly noted, Jones's counsel had the benefit of Jones's 1979 trial, which led to a conviction and the imposition of a sentence of death, to assist in determining an appropriate defense to the evidence. Davis, one of Jones's counsel in the 1982 trial, represented Jones in the 1979 trial; therefore, he had knowledge of what defense tactics were effective based on the state's evidence, and what defenses, especially the one of nonparticipation raised in the 1979 trial, were not.

Jones v. State, 753 So. 2d 1174, 1183–84 (Ala. Crim. App.), *cert. denied*, (Ala. 1999). Further, on particular claims that counsel failed to investigate certain types of evidence, the Court of Crimsinal Appeals stated.

> With regard to this claim, the trial court entered the following findings of fact:
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> * * *
>
> > "The record reflects that counsel for petitioner investigated and pursued a mental health defense for the first trial. Petitioner had been evaluated by the Lunacy Commission. Previous counsel, during the first trial, had filed appropriate motions for mental evaluations and had conducted depositions of the mental health experts who evaluated petitioner. The trial court subsequently denied the motion for private

> psychiatric examination and testing and funds for an expert witness in the field of mental health to perform intelligence and personality tests on the petitioner. (C.R. 204–205). Thereafter, petitioner was granted his right to refile his motion for psychiatric examination and said motion was granted. (C.R. 106).
>
> "Subsequently, in preparation for the second trial, Jack Davis filed a motion for expert witnesses including mental health experts and filed a motion for private psychiatric examination and testing. (CR. 204–205). That was denied by the Court on December 7, 1982. (CR. 205). This Court finds that counsel in the 1982 trial filed the appropriate motions requesting mental health experts and the appropriate evaluations and tests to be performed upon petitioner and was denied relief by the Court."
>
> * * *
>
> The record supports the trial court's findings.

Jones v. State, 753 So. 2d 1174, 1192–1194 (Ala. Crim. App.), *cert. denied*, (Ala. 1999). In resolving similar claims in the Rule 32 proceedings, the Alabama Court of Criminal Appeals concluded the following:

> Jones contends that his trial counsel rendered ineffective assistance during the sentencing phase of his trial because, he says, his counsel failed to investigate and to present available mitigating evidence. Specifically, he maintains that his trial counsel could have provided testimony concerning his mental health, evidence

that he did not deliver the fatal blows to the victims, and testimony from family members and friends about his background that would have been useful as mitigation. At Jones's trial the only evidence presented by the defense during the sentencing phase was Jones's testimony in his own behalf about a prior conviction.

While counsel has a duty to investigate in an attempt to locate evidence favorable to the defendant, "this duty only requires a *reasonable* investigation." *Singleton v. Thigpen*, 847 F.2d 668, 669 (11th Cir. 1988), *cert. denied*, 488 U.S. 1019, 109 S.Ct. 822, 102 L.Ed. 2d 812 (1989) (emphasis added). See *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066; *Morrison v. State*, 551 So. 2d 435 (Ala.Cr.App.1989), *cert. denied*, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed. 2d 301 (1990). Counsel's obligation is to conduct a "substantial investigation into each of the *plausible* lines of defense." *Strickland*, 466 U.S. at 681, 104 S.Ct. at 2061 (emphasis added). "A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made." *Id.*, 466 U.S. at 686, 104 S.Ct. at 2063.

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation

> decisions are reasonable depends critically on such information."
>
> *Id.*, 466 U.S. at 691, 104 S.Ct. at 2066.

Jones v. State, 753 So. 2d 1174, 1191 (Ala. Crim. App.), *cert. denied*, (Ala. 1999). Thereafter, analyzing several claims that counsel failed to present (as distinct from investigate) specific types of mitigation evidence, the Court of Criminal Appeals concluded that counsel conducted a reasonable investigation and were not ineffective. It wrote:

> Moreover, because we have determined that evidence of Jones's alleged mental illness, the forensic evidence, and the testimony of family and friends would not have established a mitigating circumstance, we cannot hold that Jones's trial counsel was ineffective for failing to present this evidence. We note that there is nothing in the record to suggest that Jones's trial counsel ignored matters that should reasonably have alerted them to Jones's mental health or to the value of contacting persons who might have information about Jones's background that might aid in his defense. See *Cochran v. State*, 548 So. 2d 1062 (Ala.Cr.App.), *cert. denied*, 493 U.S. 900, 110 S.Ct. 259, 107 L.Ed. 2d 208 (1989). Jones has not proven by a preponderance of the evidence that his attorneys were ineffective because they failed to investigate and present possible mitigating evidence. *Fortenberry*, 659 So. 2d at 200. "In a challenge to the imposition of a death sentence, the prejudice prong of the *Strickland* inquiry focuses on whether 'the sentencer . . . would have concluded that the bal-

ance of aggravating and mitigating circumstances did not warrant death.'" *Stevens v. Zant*, 968 F.2d 1076, 1081 (11th Cir. 1992), cert. denied, 507 U.S. 929, 113 S.Ct. 1306, 122 L.Ed. 2d 695 (1993), quoted in *Daniels*, 650 So. 2d at 568. Jones has not established a reasonable probability that but for his counsel's failure to call these witnesses and present the alleged mitigating evidence during the sentencing phase of his trial that the outcome of the sentencing proceeding would have been different.

> "Further, we cannot say that the appellant suffered any prejudice based on counsel's performance because he failed to demonstrate any evidence of mitigation. Prejudice cannot merely be alleged; it must be affirmatively proved. *Duren v. State*, 590 So. 2d 360 (Ala.Cr.App.1990). Thus, the appellant has not shown that there is a reasonable probability that the outcome of this trial would have been different, but for trial counsel's performance. *Baldwin [v. State*, 539 So. 2d 1103 (Ala.Crim.App. 1988)], *Thompson v. State*, 581 So. 2d 1216 (Ala.Cr.App.1991), cert. denied, 502 U.S. 1030, 112 S.Ct. 868, 116 L.Ed. 2d 774 (1992)."

Brooks v. State, 695 So. 2d 176, 182 (Ala.Cr.App.1996), aff'd, 695 So. 2d 184 (Ala. 1997), cert. denied, 522 U.S. 893, 118 S.Ct. 233, 139 L.Ed. 2d 164 (1997). See also *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir.), *cert. denied*, 516 U.S. 856, 116 S.Ct. 160, 133 L.Ed.

> 2d 103 (1995) ("our decisions teach that whether counsel's performance is constitutionally deficient depends upon the totality of the circumstances viewed through a lens shaped by the rules and presumptions set down in *Strickland v. Washington*, and its progeny"); and *Singleton*, supra (petitioner made no showing of prejudice resulting from alleged inadequate investigation by trial counsel where petitioner failed to proffer the type of mitigating evidence that would have changed outcome of trial had trial counsel conducted further investigation). Because Jones has not shown that any additional evidence would have changed the trial court's decision regarding sentencing, we agree with the trial court's ruling that trial counsel did not render ineffective assistance with regard to the investigation and presentation of mitigating evidence during the sentencing phase of Jones's trial. *Davis v. State*, 720 So. 2d 1006 (Ala.Cr.App.1998), cert. denied, 525 U.S. 1149, 119 S.Ct. 1049, 143 L.Ed. 2d 55 (1999).

Jones v. State, 753 So. 2d 1174, 1197 (Ala. Crim. App.), *cert. denied*, (Ala. 1999).

These findings and conclusions are entitled to a presumption of correctness under 28 U.S.C. § 2254. *See* 28 U.S.C. § 2254(d)&(e)(1). Nowhere has petitioner attempted to show that these findings and conclusions are contrary to or an unreasonable application of binding Supreme Court precedent. Indeed, the conclusions reached by the state courts appear to be based precisely on the *Strickland* standard and, thus, are certainly not "contrary" to Supreme Court precedent.

These conclusions also are not an "unreasonable application" of *Strickland*. In essence, the state courts found that counsel conducted a reasonable investigation under the circumstances known to them at the time of the 1982 trial.[5] They looked into and were aware of petitioner's mental health history and, in fact, initially attempted to mount a "mental health defense" at the 1979 trial, to which petitioner expressed dissatisfaction. The record supports the finding that petitioner's mental status was the subject of evaluation at Bryce Hospital in 1979, dur-

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[5] An important consideration to keep in mind when assessing the fact-finding by the state courts is the allocation of the burden of proof. It is the petitioner's burden to prove his allegations by a preponderance of the evidence, and to the extent that the *absence* of evidence affects the fact-finding process, the burden of that absence falls on the petitioner. In this case, for instance, co-counsel Jack Davis, who represented petitioner at both his 1979 and 1982 trials, died before the 1996 Rule 32 hearing. The extent to which he could have elucidated the investigation he conducted for the defense will never be known. The absence of this testimony, however, implicates the burden of proof the petitioner must bear, not any that respondents must carry. Stated another way, the petitioner must prove that Davis and other co-counsel *failed* to conduct a reasonable investigation of his defenses and any mitigation that might be presented during the penalty phase. The burden is not on the respondents to prove that a reasonable investigation did occur. Insofar as Davis's death prevents proving what he did or did not do, the lack of evidence falls on the petitioner because he bears the burden of proving his allegations. The fact-finding courts will not presume, simply because Davis is unavailable to testify concerning whatever investigation he might have conducted, that his investigation was constitutionally inadequate. Petitioner makes much of the fact that co-counsel George Boles admitted that he conducted little or no investigation, but it must be remembered that Boles was appointed to represent petitioner in 1982 *only days before trial began*. Prior to that time, Davis had been representing petitioner since 1979. Thus, it is not surprising that Davis, not Boles, would have conducted the pretrial investigation of the case and that Boles was unable to describe it later at the Rule 32 hearing.

ing which two doctors opined that petitioner was not psychotic and was competent to stand trial. Implicit in the finding made by the state courts that Mr. Roundtree (with co-counsel, Mr. Davis) sought to present a mental health defense at the 1979 trial is the conclusion that some investigation of petitioner's mental health history took place. While counsel was aware of petitioner's drug use and its degradation of his mental state, no true psychological data existed in 1982 suggesting that petitioner suffered from a serious mental illness. There is little, if any, evidence that petitioner's 1982 behavior or demeanor suggested a mental problem. Counsel's motion for funds to hire a defense psychiatrist was denied, thus leaving counsel with no other source of psychological data but the 1979 evaluation. Because that data presented nothing that could be used effectively for defense or mitigation, the failure to further investigate it (or present it) was not ineffective assistance.[6]

Given that some investigation took place that Mr. Davis was aware of and given that petitioner opposed a mental health defense, it was not unreasonable for counsel to focus their investigative efforts elsewhere at the time of the 1982 trial. That petitioner was able to offer an expert at the 1996 Rule 32 hearing, raising questions about the petitioner's mental state, does not indicate that counsel's investigation of it in 1979 and 1982 was constitutionally inadequate. Much of the evidence relied upon by petitioner's expert witness in 1996 consisted of petitioner's treatment during his prison incarceration,

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[6] Boles considered the insanity defense, but decided not to use it because implied in that defense is the fact that petitioner committed the crime. (R. 32 at 252–53).

long *after* the 1982 trial, evidence that did not exist and could not have been discovered by counsel in 1982.[7]

The state appellate court's conclusion that counsel's investigation of petitioner's mental state in 1982 was not constitutionally ineffective assistance is neither contrary to nor an unreasonable application of Supreme Court precedent. Consequently, it is entitled to a presumption of correctness and deference under § 2254(d).

Likewise, the state courts concluded that counsel were not ineffective for failing to investigate more thoroughly the assertion that the victims were dead when petitioner stabbed them. The courts pointed out that petitioner staunchly denied any participation in the actual killings until he filed the Rule 32 petition. Counsel were not ineffective for advocating the position taken by petitioner that, although present, he was not involved in the killings. Given petitioner's primary defense at trial, counsel certainly were not ineffective for declining or failing to advance the contradictory argument that petitioner *did* stab the victims, but they were already dead.

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[7] At petitioner's Rule 32 hearing, Willie Woods, a family friend, testified that petitioner was just like a normal kid and had good work habits. (R. 32 at 252–53). Additionally, petitioner's uncle testified that petitioner had good examples in his life and that he followed people who were good examples. (R. 32 at 242–45). When asked whether it would be fair to say petitioner had a rough life coming up, he testified "I imagine he did in his early childhood, yes." (R. 32 at 243). Further, the uncle testified that petitioner was only twice moved from one place to another. *Id.* When asked specifically about whether the source of petitioner's problems was "following those people that are the bad examples instead of following the ones that are the good examples," the uncle testified: "I don't think so. It was just at that particular time that he was with the group that decided to get into trouble." *Id.* at 246. Both of these witnesses who had the opportunity to observe petitioner testified regarding petitioner's personality prior to the murder, and contradict evidence relied on by petitioner's expert witness in 1996.

Such an alternative defense would have undermined the primary defense. Because it was not reasonable for counsel to attempt to present alternative, but contradictory defenses, it also was not unreasonable for counsel not to waste defense time and resources on *investigating* the defense. Petitioner presented counsel with his defense that he did not participate in the actual killings; counsel was not free to disregard that defense, and it would have been unreasonable for counsel to seek to present another defense that essentially put the lie to the defendant's position. Given defendant's position and the unavailability of the alternative defense, it was not unreasonable for counsel to forego additional investigation of it.

Additionally, the forensic evidence presented by the State, as well as the testimony of the surviving victims, left little room for the defense to argue that the murder victims were already dead when petitioner stabbed them. At the time of trial, the forensic report of Dr. Embry indicated that the stab wounds to the victims were premortem. Another witness testified that the victims were moaning as petitioner stabbed them, and even in his confession, petitioner stated that the "woman" moved just before he stabbed her. In light of this evidence, it was not unreasonable for counsel to forego further investigation of the position that the victims were, in fact, dead when petitioner stabbed them.

But even if it is true that the victims were dead when petitioner stabbed them, that is neither a defense to the capital charge nor sufficiently mitigating to fault counsel for failing to further investigate it. The clear evidence was that petitioner, armed with a gun, accompanied co-defendant Giles, also armed with a gun, to the victims' home for the purpose of robbing them, where Giles shot and stabbed the victims and other members of their family. Petitioner then came into the

house and, at Giles' direction, stabbed the victims several times. Even assuming that the victims were already dead when petitioner stabbed them, his active presence and assistance to Giles aided and abetted Giles' actual killing of the victims while petitioner himself possessed an intent that deadly force be used against them. Plainly, even if the victims were killed by Giles and petitioner's blows were not the direct cause of death, his participation in Giles' actions made him equally culpable. The evidence sufficiently supported the conclusions that petitioner both actively aided and assisted Giles and that he possessed the requisite intent that deadly force be used against the victims. He and Giles both took handguns to the scene for the purpose of robbing the victims. Clearly, the possibility that deadly force would be used was known to and accepted by petitioner from the beginning. Thus, even assuming his current position to be correct, he is nonetheless guilty of capital murder as an aider and abetter.

Furthermore, that the victims might have been dead when petitioner stabbed them was not mitigating evidence for sentencing purposes. There is no evidence that, when he stabbed them, petitioner knew they were already dead; indeed, he admitted in his confession that the "woman" moved as he stabbed her, indicating that he *believed* she was alive. He exhibited a willingness and intent to kill, which hardly seems like mitigation.

Consequently, even if counsel had more thoroughly investigated the forensic question whether the victims were already dead, it is unlikely that such fact would have constituted either a defense to the crime or mitigation for sentencing purposes. This court, therefore, agrees with the Alabama Court of Criminal Appeals that counsel were not ineffective for failing to invest more time and effort in investigating this evidence. Again, the

conclusion by the state courts that counsel were not ineffective for failing to investigate the forensic issue of the death of the victims is supported by the evidence and is neither contrary to nor an unreasonable application of Supreme Court precedent.

Petitioner also contends that counsel were ineffective in their investigation of evidence of his drug abuse and his abusive childhood. The state courts concluded that because neither of these areas of evidence would be fruitful, either as a defense or as sentencing mitigation, it was not unreasonable for counsel not to expend time and effort investigating them at the time of the 1982 trial. Evidence of petitioner's drug use was presented to the jury during the guilt phase of the 1982 trial. There was testimony that Giles and petitioner had been drinking and using drugs prior to the crime. Witnesses testified that they appeared drunk and petitioner admitted in his confession that he was "so far gone" that he stabbed wildly. This evidence did not lead to a better outcome for petitioner, and there is no reason to believe the jury failed to consider it for whatever mitigating power it had during the sentencing phase. The courts have noted that evidence of drug and alcohol abuse "often has little mitigating value and can do as much or more harm than good in the eyes of the jury." *Crawford v. Head*, 311 F.3d 1288, 1321 (11th Cir. 2002); *see also Haliburton v. Secretary for the Dep't of Corr.*, 342 F.3d 1233 (11th Cir. 2003). Because of the double-edged sword such evidence presents, counsel is given great deference in the decision whether or not to resort to it.

Similarly, the state-court conclusion that counsel cannot be faulted for failing to further investigate petitioner's family background is not an objectively unreasonable application of *Strickland*. No evidence was presented at the Rule 32 hearing suggesting that peti-

tioner ever mentioned his abusive childhood to counsel, while Boles testified that, at the time of the 1982 trial, there was an "estrangement" between petitioner and his family. Despite that estrangement, counsel was in contact with petitioner's uncle, who revealed nothing to them about childhood abuse of the petitioner. Indeed, the only Rule 32 witness actually able to describe petitioner's abusive childhood was his sister, Glen Jones. Ms. Jones had been presented as a witness at the 1979 trial and counsel felt she made a poor impression on the jury because of her admitted drug use around her children. Therefore, counsel was reluctant to use her again. Given these obstacles, this court agrees with the Alabama Court of Criminal Appeals that counsel were not ineffective because they decided to focus their investigative efforts elsewhere.

It was not unreasonable for counsel to put less emphasis on the investigation of this evidence in favor of other potential mitigation evidence that was less likely to strike a controversial note with the jury.[8] The state court conclusion that counsel was not constitutionally ineffective because they did not pursue these lines of investigation is not contrary to or an unreasonable application of *Strickland* and, thus, is entitled to deference. In summary, petitioner is entitled to no habeas relief on the claim that he received ineffective assistance of counsel due to their failure to investigate other defenses and mitigation.

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[8] In this case, counsel's mitigation theory advanced two arguments: first, lingering reasonable doubt about whether petitioner was involved in the actual killings and, second, that he was a weak follower who was bossed around by co-defendant Giles.

II. Habeas Claim A(2) (Insufficient Funding)—Petitioner's Habeas Claim A(2) alleges that counsel's representation was constitutionally ineffective because the State of Alabama grossly under-funds the representation of capital defendants, hamstringing counsel's ability to represent adequately their clients. *See* Petition, ¶¶ 39–40. It appears that, although the claim was raised in the Rule 32 petition, it was not asserted on appeal from denial of Rule 32 relief. A careful review of the petitioner's brief on appeal from denial of Rule 32 relief (Tab R-42) and the opinion of the Alabama Court of Criminal Appeals (Tab R-53) both fail to reveal any form of this particular claim being argued. Failure to assert a claim on appeal from denial of collateral relief is a waiver and procedural default of the claim. *Esslinger v. Davis*, 44 F.3d 1515 (11th Cir. 1995). Petitioner has shown no cause and prejudice to excuse the default, nor has he made a colorable showing of factual innocence to come within the "fundamental miscarriage of justice" exception to procedural default. Consequently, this claim is due to be denied as procedurally defaulted.

But even if not procedurally defaulted, it fails to state a claim for habeas relief. Under the *Strickland* standard, a petitioner alleging ineffective assistance of counsel must identify particular errors or deficiencies in counsel's representation, proving how those errors and deficiencies caused actual prejudice to the defense. Here, petitioner has made no attempt to link particular errors, deficiencies, or problems with his defense to a lack of funding for counsel. Even though one might assume that the limitation of funding for counsel in capital cases causes real problems, an assumption is not enough to prove a constitutional violation. Petitioner must allege and show that some specific shortcoming in counsel's representation of him was directly attributable to a lack

of funding. That has not been done in this case. Given the strong presumption of competence afforded counsel under *Strickland*, the court cannot simply assume that inadequate defense funding actually produced a constitutionally ineffective performance by counsel. The issue is not what counsel could have done if they were given unlimited money; rather, it is whether the limitation on funds sank their representation below a constitutional minimum. Aside from the general complaint that funding was inadequate, there is no attempt by petitioner to show how the inadequate funding produced an ineffective performance by counsel. No relief is warranted on this claim.

III. Habeas Claim A(3) (Failure to Present Mitigating Evidence)—At paragraphs 41 through 58 of the habeas petition, petitioner pleads his most extensive claim of ineffective assistance. He alleges that counsel were ineffective during the penalty phase of trial because they failed to present any mitigating evidence, in particular, evidence of his mental health history, evidence that petitioner did not kill the victims because they were already dead when he stabbed them, evidence of his abusive childhood, and evidence of the history and effect of his substance abuse. This claim is similar to habeas claim A(1), which focused on counsel's alleged failure to adequately investigate and discover evidence relating to these mitigation theories.

In resolving this claim during the Rule 32 proceedings, the Alabama Court of Criminal Appeals held generally that the evidence relating to these factors was too weak for any of them to have any significant mitigating effect on the sentence and, consequently, counsel's failure to present the evidence was not prejudicial for purposes of the *Strickland* standard of ineffective assistance. With respect to the petitioner's mental health,

the Court of Criminal Appeals reviewed the extensive testimony presented at the Rule 32 hearing, and reached the same conclusion as the trial court, that the evidence of mental illness was too weak to have any mitigating effect. The court wrote:

> We agree with the trial court that the evidence presented by Jones in support of this claim, including the testimony of Dr. Fisher and the depositions and affidavit of other expert witnesses, was not adequate evidence of a mitigating circumstance and was refuted by other testimony and evidence admitted at the hearing and at trial. It is particularly significant that although Jones was provided with the opportunity and was even transported to a proper facility to be tested to determine an organic basis for the alleged mental health problems before his Rule 32 hearing, he admitted no test results but relied solely on opinion evidence to establish his alleged mental health problems. Additionally, we find significant the finding of the Lunacy Commission, which conducted an evaluation before Jones's [1979] trial that was relied upon heavily by his Rule 32 witnesses, that Jones was not suffering from a mental illness at the time of the acts charged that would have prevented him from distinguishing right from wrong or that would have prevented him from adhering to what was right. In this situation, the trial court made certain credibility determinations which are within its discretion. *Brownlee v. State*, 666 So. 2d 91 (Ala.Cr.App.1995). We concur with the trial court's finding that Jones has failed to establish concrete evidence to support the suggestion

> that he was under extreme mental and emotional stress during the murders. See § 13A-5-51, Ala. Code 1975. Consequently, Jones has failed to meet his burden of proof to establish a claim of relief in this regard. See Rule 32.3, Ala.R.Crim.P.

Jones v. State, 753 So. 2d 1174, 1194–1195 (Ala. Crim. App.), *cert. denied*, (Ala. 1999).

Similarly, the court rejected the argument that petitioner's sentence could have been mitigated by evidence that the victims were already dead when he stabbed them. The court recounted the evidence presented by both sides and concluded that the State's forensic evidence of death was more credible than the petitioner's. The Court of Criminal Appeals held:

> We find no abuse of discretion in the trial court's finding that Dr. Embry's testimony was more credible than Dr. Frist's, and its subsequent finding that Dr. Frist's testimony would not have been considered mitigating by the jury or by the court. *Brownlee*, supra. Additionally, we concur with the trial court's observation that "this crime was so savage and brutal that participation in any way by the petitioner would have weighed conclusively against mitigating his involvement on the basis of who was the particular individual who delivered the fatal blows to the victims." (C.R. 1058.) Therefore, we find no error in the trial court's determination that no mitigating circumstance existed in this regard.

Jones v. State, 753 So. 2d 1174, 1196 (Ala. Crim. App.), *cert. denied*, (Ala. 1999).

Finally, the appeals court agreed with the Rule 32 court that the evidence of petitioner's abusive childhood was not strong enough to create a mitigating factor that should have been considered during sentencing. The court said:

> We have reviewed the testimony of Jones's family members and friends; none of their testimony supported a finding of a mitigating circumstance recognized by § 13A-5-51, Ala. Code 1975, and would not have changed the balance of the mitigating and aggravating circumstances in Jones's case. Therefore, we find no error in the trial court's determination that the evidence would not have changed the outcome of Jones's trial.

Id. at 1196-1197. Based on these findings, that the evidence simply did not have a strong enough mitigating impact to warrant a conclusion that the outcome of the sentencing phase would have been different if counsel had presented it, the Alabama Court of Criminal Appeals rejected the argument that counsel were ineffective during the sentencing phase of the trial.

As previously discussed, the resolution of this issue reached by the Alabama courts is entitled to a presumption of correctness and deference, unless it is contrary to or an unreasonable application of Supreme Court precedent. For the reasons addressed above under habeas claim A(1), the conclusions reached by the Court of Criminal Appeals were not contrary to or an unreasonable application of Supreme Court precedent. This court's own review of the record persuades it that the state courts' assessment of the evidence and the conclusions drawn from it are essentially correct and reasonable. For instance, the mental health evidence

available to counsel in 1982 consisted of the evaluation done at Bryce Hospital in 1979, which found no mental illness or defect that affected petitioner's ability to conform his conduct to the law. Much of the evidentiary basis for petitioner's current claim of mental illness arose *after* his trial, during his imprisonment. Certainly, it was not objectively unreasonable for the state courts to discount this evidence that did not exist at the time the trial occurred.

Insofar as petitioner criticizes counsel's failure to present evidence of his history of drug abuse as a mitigating factor, the state courts again concluded that it lacked sufficient mitigating power to undermine confidence in the outcome of the sentencing proceeding. Evidence of petitioner's drug use was, in fact, presented to the jury during the guilt phase of trial and was surely considered by them during the penalty phase. Counsel used the circumstances of the crime, including petitioner's drug intoxication, to argue that petitioner was coerced by Giles, was a "follower," and less culpable than Giles. To the extent that any mitigation could have been drawn from these particular circumstances, counsel did so.

Similarly, the court agrees that forensic evidence raising questions about whether the victims were already dead when stabbed by petitioner also lacks any significant mitigating impact. As discussed above under habeas claim A(1), the evidence that the victims were already dead when petitioner stabbed them is very weak and contradicted by forensic evidence, the testimony of surviving victims, and petitioner's own confession. But even if accepted as true, petitioner's presence as an accomplice of Giles far outweighs the mitigation argument that he only stabbed dead bodies. He was present and aided and abetted Giles' brutal murder of the victims, even if he did not inflict a fatal blow himself. The

state courts' resolution of this issue that counsel were not ineffective in failing to present this mitigation argument is entitled to deference.

The court also cannot say that the state-court assessment of the evidence relating to petitioner's difficult childhood is objectively unreasonable. Even if this court were to view that evidence more sympathetically to the petitioner, it cannot be said that the state courts' determination that it was not sufficiently mitigating to undermine confidence in the sentencing decision is objectively unreasonable. Although petitioner's sister described appalling abuse at the hands of their father, other family members could add only that petitioner was separated from his mother at an early age and that he lived with various relatives during his childhood. Counsel's experience with petitioner's sister as a witness at the 1979 trial made them hesitant to use her again, due to her own drug abuse. Other contradictory evidence indicated that he finished high school, performed reasonably well in school, and was well liked by family and friends. Even if this evidence had been fully presented to the court and jury during the sentencing phase, it is at least debatable, and therefore, objectively reasonable, that it would not have swayed the sentencing decisions.

Evidence of childhood abuse, like that of drug and alcohol abuse, often can be a double-edged sword, perhaps doing good or perhaps doing harm. For example, in *Haliburton v. Secretary for the Dep't of Corr.*, 342 F.3d 1233 (11th Cir. 2003), the court of appeals quoted the testimony of an attorney on the difficulty of the decision to present such evidence:

> At the state evidentiary hearing, Bailey testified that he chose not to present evidence about Haliburton's abusive background in part because such evidence "can paint an appealing

> picture of how your client was abused and all those factors lead up to him doing what [he] did and you may convince the jury of that absolutely; but you may also convince them that, paint a picture of Frankenstein."

342 F.3d at 1244, n.30. Although *Haliburton* is a different case, involving a different petitioner, the difficulty of deciding whether to present childhood-abuse evidence remains the same. The effect such evidence might have on the jury cannot be said to be universally favorable. That being the case, the court cannot simply assume that if counsel had presented such evidence, it would have had a mitigating effect; it might have had just the opposite effect. Thus, whether "correct" or not, the conclusion by the state courts that it would not have had a significant mitigating effect cannot be said to be objectively unreasonable. The issue is not whether this court might view the mitigating impact of this evidence differently, or even whether the state courts' conclusions are "correct." Rather, under § 2254(d) and *Williams*, the question is whether those conclusions are objectively unreasonable. Because they are not, they are entitled to deference, and habeas relief is not warranted.

IV. Habeas Claim A(4) (Failure to Object to Admission into Evidence of Presentence Report)—Petitioner contends that he received ineffective assistance of counsel during the sentencing phase of his trial because counsel failed to object to the admission into evidence (and subsequent consideration by the jury) of the presentence report prepared at the time of the 1979 trial. At paragraph 59 of the petition, he alleges:

> Trial counsel failed to object to the admission into evidence of a prejudicial presentence investigation report which included inadmissi-

> ble hearsay, the fruits of an uncounseled interview with Mr. Jones, a recounting of the effects of the crime on the victims' family, previous arrests, the personal commentary of the author and failed to include such relevant information as Mr. Jones' abuse as a child, history of drug and alcohol dependency and mental deficiencies.

Petitioner presented this exact claim in his Second Amended Rule 32 petition as claim II.A.4.nn. (*See* Second Amended Rule 32 petition, p. 14). On appeal from denial of Rule 32 relief, the Alabama Court of Criminal Appeals concluded petitioner failed to offer any proof of this claim during the Rule 32 hearing to establish either that it was true or that it prejudiced the defense. About this claim (and others), the court wrote:

> Jones claims that his trial counsel provided ineffective assistance of counsel during the guilt phase and the sentencing phase of his trial. He alleges the following as instances of ineffective assistance of counsel:
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> * * *
>
> 22. His attorneys failed to object to the admission of an allegedly prejudicial presentence report that included inadmissible hearsay.
>
> * * *
>
> Although the burden of pleading and proof as to these arguments was on Jones, see Rule 32.3, Ala.R.Crim.P., he presented no evidence at the hearing to support his argument that his counsel's performance with regard to these claims fell "outside the wide range of professionally

competent assistance." *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. He failed to satisfy the burden-of-proof requirements of Rule 32.3. Furthermore, Jones presented no evidence to show how he was prejudiced by these alleged instances of ineffective assistance. *McNair v. State*, 706 So. 2d 828 (Ala.Cr.App.1997), cert. denied, 523 U.S. 1064, 118 S.Ct. 1396, 140 L.Ed. 2d 654 (1998). As this court observed in *Stringfellow v. State*, 485 So. 2d 1238, 1243 (Ala.Cr.App.1986), " '[e]ffectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made.' "

* * *

In an exercise of diligence, however, we have reviewed each and every allegation of ineffective assistance of counsel and have found either that the allegation is without merit or that Jones failed to prove it. We have also considered the collective effect of all of the alleged errors and still find no error or violation of Jones's rights.

After reviewing the overwhelming evidence against Jones, including his confession, we believe that while his trial counsel may have made certain strategic choices that Jones now challenges, counsel did not render ineffective assistance. An accused is entitled " 'not [to] errorless counsel, and not [to] counsel judged ineffective by hindsight, but [to] counsel reasonably likely to render and rendering reasonably effective assistance.' " *Thompson v. State*, 615 So. 2d 129, 134 (Ala.Cr.App.1992), cert. denied, 510 U.S. 976, 114 S.Ct. 467, 126 L.Ed.

> 2d 418 (1993), quoting *Haggard v. Alabama*, 550 F.2d 1019, 1022 (5th Cir. 1977). We find no merit to any of Jones's allegations of ineffective assistance of counsel. Jones has not shown "by a preponderance of the evidence the facts necessary to entitle [him] to relief" on any issue concerning the ineffectiveness of his trial counsel. Rule 32.3, Ala.R.Crim.P.

Jones v. State, 753 So. 2d 1174, 1197–99 (Ala. Crim. App.), *cert. denied*, (Ala. 1999). A review of the Rule 32 hearing transcript confirms that petitioner offered no evidence concerning the introduction of the presentence investigation or its potential prejudicial effect. Failure to factually develop a claim in a hearing in state court precludes a petitioner from attempting to prove the claim at a subsequent federal habeas hearing, unless the petitioner's case meets the conditions of 28 U.S.C. § 2254(e)(2). *Michael Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed. 2d 435 (2000). Further, a review of the sentencing phase of the trial before the jury fails to reveal the introduction of a presentence investigation report into evidence for consideration by the jury.

The court finds this claim to be unsupported by any evidence. Petitioner offered nothing on it at the Rule 32 hearing, and he is now precluded from offering any other evidence under 28 U.S.C. § 2254(e)(2). There is nothing in the record to show that the jury improperly considered evidence or information from a presentence investigation report during the petitioner's sentencing phase. Further, even assuming the presentence report was admitted into evidence and the jury considered it during the penalty phase, there is no evidence that it had any illegal detrimental effect on sentencing. Petitioner has pointed to no specific part of or information contained in the presen-

tence report that the court can say undermines confidence in the outcome of the sentencing hearing. Thus, this claim is meritless.

V. Habeas Claim A(5) (Failure to Object to Electrocution as Means of Execution)—At paragraph 60 of the petition, petitioner alleges ineffective assistance of counsel due to his attorneys' failure to object to electrocution as a means of execution. As Alabama has recently adopted lethal injection as the presumptive means of execution, this claim would appear to be moot or meritless. In the very least, even if counsel can be faulted for failing to object to electrocution at the time of petitioner's sentencing, the change to lethal injection means that petitioner will suffer no prejudice from that failure. Thus, either the claim is moot or it is meritless because there is no prejudice under the *Strickland* standard.

VI. Habeas Claim A(6) (Failure to Object to Improper Comments by Prosecutor)—Petitioner asserts at paragraph 61 of the petition that he received ineffective assistance of counsel because his attorneys failed to object to certain comments made by the prosecutor during closing arguments of the penalty phase of trial. Particularly, he contends that references to him as a "blood-thirsty savage" and a "blood-thirsty murderer" prejudiced the jury and should have been the subject of objections by counsel.[9] Petitioner raised this claim in his Rule 32 petition at II.A.4.pp. (*See* Second Amended Rule 32 petition, p. 15). On appeal from denial of Rule 32 relief, the Alabama Court of Criminal Appeals concluded that petitioner failed to offer any evidence on this

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[9] A similar claim is asserted at Habeas Claim A(14).

(and other) claims and, therefore, failed to carry his burden of proving ineffective assistance.[10]

During the final arguments at the penalty phase of petitioner's trial, the prosecutor made the following comments:

> When they stand up here and tell you there is a little good in everybody and if you give him a chance, maybe way on down the line, he will do some good, that is probably correct. Does this man deserve that chance? Does it mean more to you that maybe some day this savage . . . this blood-thirsty murderer might do something good; or does it mean more to you that by your verdict, you might keep something from happening like happened to the Nelson Family, who were asleep that night when this man and his cohort came in and they shot the brother, they killed the mother and father, and they stabbed them unmercifully over and over again, through the neck and the heart? They shot the little girl's eye out. Does it mean more to you to return a verdict or to keep that from happening again in this county, to keep this blood-thirsty savage in jail and hope that someday he may do something good? It is in your hands.

Trial Record, pp. 461–2. There was no objection by defense counsel. Nonetheless, the conclusion by the

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[10] *See* quotation from *Jones v. State*, 753 So. 2d 1174, 1197–99 (Ala. Crim. App.), *cert. denied*, (Ala. 1999), in text above under section *IV. Habeas Claim A(4)*. As the trial transcript containing this part of the argument was put into evidence at the Rule 32 hearing, it is not strictly correct that no evidence was offered on the claim. There was no other evidence offered to prove any prejudicial effect by the comments.

Alabama Court of Criminal Appeals that petitioner failed to show that this was ineffective assistance is not objectively unreasonable. Taken in context, the remarks were proper argument, presenting to the jury the choices between a sentence of life in prison or a death sentence, the deterrent effect of the sentence, and balance of mitigating and aggravating circumstances present in the case. While the use of the terms "blood-thirsty savage" and "bloodthirsty murder [sic]," seem harsh, they did not undermine the fundamental fairness of the sentencing proceeding. *Spivey v. Head*, 207 F.3d 1263 (11th Cir. 2000); *Drake v. Kemp*, 762 F.2d 1449, 1458 (11th Cir. 1985) ("Improper argument will only warrant relief if it renders a petitioner's trial or sentencing 'fundamentally unfair' "). Both comments, in context, conveyed the brutality of the murders as well as the defendant's lack of remorse, both legitimate sentencing considerations. Thus, because the remarks were not improper, it was not ineffective assistance for counsel not to object to them.

Alternatively, even if counsel can be faulted for not objecting, no prejudice resulted because the comments did not undermine the fundamental fairness of the sentencing process. In either event, petitioner has not established ineffective assistance of counsel under the *Strickland* standard. This claim is meritless.

VII. Habeas Claim A(7) (Failure to Object to Comments Regarding Victim and Family Impact)—At paragraph 62 of the petition, it is alleged that petitioner received ineffective assistance of counsel because counsel failed to object to comments made by the prosecutors relating to the victim and family-member impact. This same claim was raised at paragraph qq in the Rule 32 petition. On appeal from denial of Rule 32 relief, the Alabama Court of Criminal Appeals concluded that petitioner failed to carry his burden of proving this claim at

the Rule 32 hearing. Indeed, the court found that petitioner failed to offer any evidence on this claim, among others.[11] Because petitioner had an opportunity to prove this claim in state court proceedings, he cannot offer additional evidence in support of the claim in these proceedings without satisfying Section 2254(e)(2)'s conditions. *Michael Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed. 2d 435 (2000); 28 U.S.C. § 2254(e)(2).

A careful review of the statements and arguments advanced by the prosecution during the penalty phase of petitioner's trial reveals no improper comments concerning victim- or family-impact. In his opening statement at the beginning of the penalty phase, the prosecutor described four aggravating circumstances he expected the evidence to establish in support of the imposition of the death sentence. Concerning the fourth factor, that the murder was especially atrocious, heinous, and cruel, he said:

> The fourth one is this: The capital offense was especially heinous, atrocious or cruel compared to other capital offenses. The word there is "especially". The defendant will point that out to you and so will the judge. The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

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[11] See quotation from *Jones v. State*, 753 So. 2d 1174, 1197–99 (Ala. Crim. App.), *cert. denied*, (Ala. 1999), in text above under section *IV. Habeas Claim A(4)*. As the trial transcript containing this part of the argument was put into evidence at the Rule 32 hearing, it is not strictly correct that no evidence was offered on the claim. There was no other evidence offered to prove any prejudicial effect by the comments.

> I won't back down one bit from what I said in my opening statement. This was not a murder. The evidence shows it was a mutilation of a family. I don't know how it could have been more heinous. I don't know how it could have been more atrocious; and I don't know how it could have been more cruel.
>
> We will rely on the testimony that is in evidence. We will rely on those pictures. They tell you what happened to Carl and Willene Nelson. We will rely on the testimony of Charlie Nelson. This is a part of the thing that makes this atrocious, cruel and heinous. The fact that that young boy who was ten or eleven at the time was there on that bed, and he saw all of this. He watched his father being stabbed, and he watched his mother being stabbed over and over and over again. Not only was it him, but his sister saw the same thing. They had to sit there on that bed. Can you imagine the fear? They had to sit there on the bed and watch . . . not only that, but suffer through it. Can you imagine. . . .

Trial Record, pp. 421–422. Later, in closing arguments during the penalty phase, the prosecution argued the following points that might be regarded as comments about the victims or the impact of the crime on family members:

> Mr. Boles said he would rely on some previous testimony in this guilt stage of the trial . . . the testimony of Brenda and Charlie Nelson, as mitigating factors for you to consider. I'm sure Mr. Boles and Mr. Davis will both argue to you about the mitigating circumstances

> which are revealed by Brenda and Charlie Nelson's testimony. I don't know what is mitigating about two little children lying on the bed getting their eye blown out and their bodies slashed up. He would have you to believe it is not accurate—it is incorrect. You have already made that decision. You decided he was guilty of capital murder. You have already weighed the testimony of Brenda and Charlie Nelson. You have decided whether or not to believe them. And you believed them. They were eye witnesses to their parents' mutilation.

Trial Record, p. 446. Further, in describing the robbery motive of the petitioner, the prosecutor commented that petitioner and his accomplice "wiped out the whole family." Trial Record, p. 447. Finally, responding to the argument that the victims were already dead when petitioner stabbed them, he said, "Mr. Boles said, in the case you have heard for the last three days, that maybe the people were already dead when Aaron Jones stuck them—stuck Mama twenty-seven times—maybe she was dead already. You have decided that she was not dead." Trial Record, p. 447.

Plainly these comments were not improper. The prosecution argued the evidence and the inferences properly drawn from the evidence to rebut the contentions made by petitioner's counsel for mitigation. Although these particular comments drew focus to the plight of the family members present, such was part of the circumstances of the crime itself and relevant to the aggravating factor that it was especially atrocious, heinous, and cruel. Because there was no evidentiary basis on which to object, it was not ineffective assistance of counsel not to object to them. This claim is meritless.

VIII. Habeas Claim A(8) (Failure to Adequately Pursue Defense that Victims were Dead When Stabbed by Petitioner)—At paragraphs 64 through 69 of the petition, it is alleged that petitioner received ineffective assistance of counsel because counsel failed to adequately pursue and present an alternative defense, namely, that the victims were already dead when petitioner stabbed them. This, it is argued, would show that petitioner lacked the requisite intent to kill, even as an accomplice, to make him eligible for the death penalty. *See Enmund v. Florida*, 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed. 2d 1140 (1982) (holding that the death penalty is disproportionate with respect to a defendant who did not kill, attempt to kill, and had no intention of killing). During the Rule 32 proceedings in state court, the Alabama Court of Criminal Appeals reached the following findings and conclusions:

> "Charlie Nelson testified that he saw Giles when his father, Carl Nelson, asked Giles to leave the home. He saw Tony leave and heard two gunshots. Giles, then, reappeared and shot Charlie's grandmother, who was standing in the doorway to Charlie's bedroom. Giles proceeded to Charlie's parents' bedroom from where Charlie heard more gunshots. Charlie ran to his parents' bedroom, where he saw Giles and another man, whom he positively identified at trial as the appellant. He realized that his mother, his father and his sister had all been shot. He jumped on top of his sister to protect her from further harm. *As he lay there, he saw the appellant stab his mother and father with a knife. His mother and father were both moaning as the appellant repeatedly stabbed them.* [Italics added].

* * *

"Dr. Joseph Embry of the Alabama Department of Forensic Science testified that Willene Nelson died from multiple stab wounds that damaged her heart, lungs, and kidneys. Her body received 29 knife wounds (17 stab wounds and 12 slash wounds), numerous lacerations and abrasions about the head from a blunt instrument, and one gunshot wound to the left shoulder. Dr. Embry testified that Carl Nelson died from a combination of gunshot wounds and stab wounds. He was shot once through the heart and once in the left arm. He was stabbed, approximately, eight times, including a stab wound in the neck which severed his spinal cord. He also received numerous blunt instrument abrasions about the head. *Dr. Embry testified that Carl Nelson was alive when he was stabbed in the neck.*" [Italics added].

* * *

Jones argues that his trial counsel should have investigated thoroughly the timing of the allegedly fatal blows inflicted by Giles and compared those Jones admitted inflicting in his statement. Jones further claims that evidence "(1) that before he inflicted any wounds both victims were already dead and (2) that [consequently] he did not and could not form the intent required for a conviction of capital murder" was available to his trial counsel at the time of his trial and could have been used to show that he did not kill two or more persons pursuant to one course of conduct and that he did not have the necessary intent to kill.

The trial court found as follows with regard to this claim:

> "Jack Davis participated in the first trial and was co-counsel to Mr. Roundtree. Having participated in the prior trial, Davis was intimately acquainted with all the facts, circumstances, and evidence necessary to adequately represent Jones in 1982. At trial in 1982, Davis and Boles presented a reasonable, coherent defense of Jones. It is evident from the record that Jones denied any involvement in the murders. Instead, he claimed that he was present but did not inflict any knife wounds or gunshot wounds to the victims. The State's case depended upon the statements of the Nelson children who were surviving victims, and the confession of Jones. Boles aggressively attacked the witnesses' versions of events. Counsel impeached Brenda Nelson with prior inconsistent statements that she had made. In fact, counsel had admitted prior inconsistent statements over the objections of the State and prevented the State from admitting into evidence the entirety of her statements. Counsel also vigorously opposed the admission of Jones's confession during the hearing on their motion to suppress and during the testimony of the State's witnesses before the jury. Review of Mr. Davis's and Mr. Boles's examination of witnesses at trial confirms that both trial counsel were well prepared and were knowledgeable of all the facts and circumstances of the crime.

"Petitioner now, in [a] Rule 32 [petition], presents a different defense theory and strategy to this Court. That strategy and defense is that Jones was at the scene of the murder, was asked to enter the house after the co-defendant Giles had shot and stabbed the victims, and that Jones, at Giles's command, stabbed the victims. Although he stabbed the victims, petitioner now claims that evidence shows that Carl and Willene Nelson were deceased at the time he inflicted the wounds on their bodies; therefore, this is evidence of Jones's lack of intent to commit murder. The presentation of this new theory is no more than second-guessing trial counsel's performance after petitioner's conviction and adverse sentence when the defense at trial proved to be unsuccessful. This is the situation of which Strickland warned.

"Under the circumstances, and evaluating the conduct of counsel and their perspective at the time of the challenged conduct, it is clear, based upon the first trial and the statements of Jones during his sentencing in the first case (CR 27, 28, 30, 31), that Jones was denying that he inflicted any wounds whatsoever on the victims. It is clear from his statements to the trial court concerning his attorney that this was his plea and that he was dissatisfied with his attorney, Mr. Roundtree, for trying to present a mental health defense. The record also shows that petitioner alleged that his confession was only made because of

promises made by the sheriff's department concerning bond and that the statement was not true but that he was coerced into making it. It would have been unreasonable for counsel to argue before the jury the alternative, contradictory theory that petitioner now presents before this Court.

"Under the circumstances that existed at the time of trial, counsel could not have presented the defense not offered, and therefore was not ineffective for not developing the strategy concerning the timing of the fatal blows and the blows that petitioner now argues that he did inflict. Trial counsel had the benefit of hindsight from the first trial in which to prepare and try the 1982 case for petitioner. This Court, however, may not indulge in hindsight in its scrutiny of trial counsel's conduct." (C.R. 1044–46.)

The trial court's findings, which are supported by the record, indicate that it understood Jones's defense at trial and that counsel, in light of their knowledge at the time of trial, presented a vigorous defense. As the trial court correctly noted, Jones's counsel had the benefit of Jones's 1979 trial, which led to a conviction and the imposition of a sentence of death, to assist in determining an appropriate defense to the evidence. Davis, one of Jones's counsel in the 1982 trial, represented Jones in the 1979 trial; therefore, he had knowledge of what defense tactics were effective based on the state's evidence, and what defenses, espe-

cially the one of nonparticipation raised in the 1979 trial, were not. Additionally, as the trial court found, Jones refused to engage in a plea bargain before the 1982 trial; that refusal indicated that he was not admitting any participation in the murders. Because the proposed theory of lack of intent would require Jones to admit participation in the acts, the theory presented in his Rule 32 petition is incongruent with Jones's actions and defense at trial. We have reviewed the record of Jones's direct appeal and agree with the trial court that Jones's counsel did an adequate job in developing a defense based on Jones's assertions at the time of the trial and the facts and circumstances of the case.

Moreover, in light of the evidence presented at trial, Jones's trial counsel may have made a strategic decision to not focus on the issue whether the victims were dead prior to Jones's participation. The victims were stabbed numerous times; there was testimony that the victims either moaned or moved while Jones was stabbing them. If the testimony Jones contends should have been used at trial was used, Jones would have essentially admitted participation in the stabbings. Consequently, if the jury rejected the expert testimony that the victims were already dead when Jones stabbed them, the jury could only conclude that Jones killed the victims. Furthermore, the gravity of the eyewitness testimony that the victims lay groaning, which leads to the reasonable inference that the victims were alive before Jones stabbed them and while Jones was stabbing

> them, was an additional factor to consider in presenting such a defense.
>
> Finally, we note that even if Jones did not inflict the fatal blows, he would still be guilty of capital murder as an accomplice. Based on the totality of the circumstances, we find that Jones has failed to establish prejudice and a reasonable probability that, but for trial counsel's actions in failing to present evidence that the victims were already dead before Jones's participation in the incident, the outcome of his trial would have been different. "Strategic choices made after thorough investigation of relevant law and facts are virtually unchallengeable." *Ex parte Lawley*, 512 So. 2d 1370, 1372 (Ala. 1987). We will refrain from the use of hindsight in evaluating trial counsel's decisions. *See Hallford*, 629 So. 2d at 9; and *State v. Tarver*, 629 So. 2d 14, 21 (Ala.Cr.App.1993). *See also Cade v. State*, 629 So. 2d 38, 42 (Ala.Cr.App.1993), *cert. denied*, 511 U.S. 1046, 114 S.Ct. 1579, 128 L.Ed. 2d 221 (1994) (holding that "an attorney may reasonably decide to avoid presenting evidence [or a defense] that he believes will do more harm than good"). We agree with the trial court's ruling that Jones's counsel did not render ineffective assistance in this regard.

Jones v. State, 753 So. 2d 1174, 1179, 1183–85 (Ala. Crim. App.), *cert. denied*, (Ala. 1999).

These findings and conclusions are not objectively unreasonable and, thus, are entitled to a presumption of correctness under § 2254(d). In light of the evidence, it was not unreasonable for counsel to elect to pursue the

defense they did, rather than a contradictory defense that had no hope of success. Even if both victims were already dead when petitioner stabbed them, this neither negates his participation in the killings as an accomplice nor does it eliminate the fact that he intended to kill when he went to the house, armed with a pistol, to rob the occupants. For this defense to succeed, petitioner would have had to create a reasonable doubt in the minds of the jurors, not only that one of the victims was already dead,[12] but also that petitioner knew he or she was dead and, further, that he never intended for anyone to get killed, despite that fact that he and Giles, both armed, went to the house to rob the occupants. The conclusion that counsel were not constitutionally ineffective, either because they chose to forego this defense or because no prejudice resulted from failing to present it, is neither contrary to nor an unreasonable application of *Strickland*. Therefore, petitioner is not entitled to relief on this claim.

IX. Habeas Claim A(9) (Failure to Object to Accomplice Liability Instruction)—At paragraphs 71 through 76 of the petition, petitioner alleges that he received ineffective assistance of counsel because his attorneys failed to object to the trial court's jury instruction on accomplice liability. In particular, petitioner asserts that the court's instruction omitted the requirement that he have "a particularized intent to kill," beyond his mere participation in the acts of his accomplice.

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[12] Petitioner was charged only with the capital offense of killing two or more persons, not with the distinct capital offense of killing a person during a robbery. Thus, to carry its burden of proving this offense, the prosecution was required to prove that petitioner participated in or aided and abetted the intentional killing of both victims.

The Alabama Court of Criminal Appeals considered this claim on appeal from denial of Rule 32 relief. It said:

> Jones argues that the trial court's instruction on accomplice liability was "clearly improper and erroneous because it failed to instruct the jury on the particularized intent to kill necessary to sustain a capital murder conviction." (Appellant's brief at pp. 20–21.)
>
> The trial court instructed the jury as follows with regard to particularized intent and accomplice liability:
>
> > "A person cannot be guilty of murder in the first degree under [§ 13-11-2(a)(10), Ala. Code 1975] [footnote omitted] unless all four of these elements are present. First, he has to intend to take human life when he does the act. Second, he has to kill willfully. Third, he has to kill deliberately and with premeditation. And four, he must kill with malice aforethought. If any one of these four elements is absent, he is not guilty of murder in the first degree as set out in the statute defining murder in the first degree. *In addition to being convinced beyond a reasonable doubt and to a moral certainty that the defendant committed murder in the first degree, as I have defined to you, it would also be necessary for the State of Alabama to prove beyond a reasonable doubt and to a moral certainty that at said time two or more human beings were intentionally*

killed by the defendant by one or a series of acts.

"So to find the defendant guilty as charged, *you would also have to find from the evidence beyond a reasonable doubt and to a moral certainty that the defendant did by one or a series of acts intentionally kill two or more human beings.* If after consideration of all the evidence in the case, you are convinced beyond a reasonable doubt and to a moral certainty that the defendant is guilty of murder in the first degree, as I have explained to you, and *if you are further convinced beyond a reasonable doubt and to a moral certainty that the defendant did at the same time and occasion intentionally kill two or more human beings by one or a series of acts as charged in the indictment*, then it would be your duty to find the defendant guilty as charged.

"Now, ladies and gentlemen, there has been some evidence offered in this case indicating that at the time and the place this alleged offense occurred there was more than one person who was present and participated in the act that was set out by the wording of the indictment. Under our law it is well established that when by prearrangement or on the spur of the moment two or more persons enter upon a common enterprise or a venture and a criminal offense is contemplated, each is a co-conspirator. And if the purpose was carried

> out, each is guilty of the offense committed whether he did any overt acts or not. This rests on the principle that one who is present, encouraging, aiding, abetting or assisting the other in the perpetration or commission of an offense is a guilty participant, and in the eye of the law is as equally guilty as the one who does the act. Such community of purpose or conspiracy need not be proved by positive testimony. The jury is to determine whether that exists and the extent of it from the conduct of the parties and all the testimony in the case.
>
> "When two or more persons enter upon an unlawful purpose with the common intent to aid and encourage each other in anything within their common design, they are each responsible for everything which was consequently and subsequently the result from such unlawful purpose whether specifically contemplated or not."

(C.R. 685–88; R. on dir. app. 395–98.)

The trial court's instruction that the jury find that Jones had the requisite intent immediately preceded its instruction on accomplice liability. When read together, and especially in light of the fact that the instruction on accomplice liability immediately followed the trial court's instruction on the necessity of finding a particularized intent to kill, we find no reversible error in the trial court's charge to the jury. We acknowledge that the portion of the trial court's instruction that states, "they are each respon-

> sible for everything which was consequently and subsequently the result from such unlawful purpose whether specifically contemplated or not" may be confusing and may appear prejudicial. However, we believe, in light of the concreteness of the trial court's instruction on the finding of particularized intent and in light of the evidence, argument, and instructions presented at trial, the jury, even if it convicted Jones based on the theory of accomplice liability, found that Jones possessed the necessary intent to kill. Therefore, the trial court's instructions on intent and accomplice liability when given a reasonable construction in light of the facts adduced at trial did not constitute reversible error. *Davis v. State*, 740 So. 2d 1115 (Ala. Cr.App. 1998); *Roberts v. State*, 735 So. 2d 1244 (Ala. Cr.App. 1997); and *George v. State*, 717 So. 2d 827 (Ala. Cr.App. 1996), rev'd on other grounds, 717 So. 2d 844 (Ala. 1996).
>
> Because we find no reversible error in the trial court's instruction to the jury on accomplice liability and particularized intent, we cannot conclude that Jones's trial counsel was ineffective for not challenging these instructions. Counsel cannot be ineffective for failing to raise nonmeritorious objections. [Italics added].

Jones v. State, 753 So. 2d 1174, 1185–87. (Ala. Crim. App.), *cert. denied*, (Ala. 1999).

These findings and conclusions are not objectively unreasonable and, thus, are entitled to a presumption of correctness under § 2254(d). Read in its entirety, the court clearly instructed the jury twice that the State's

burden of proof included proving that petitioner had a particularized intent to kill. The conclusion by the Court of Criminal Appeals that counsel was not ineffective, either because no meritorious objection existed or because the instruction was sufficiently clear to leave the jury with no confusion about intent, was neither contrary to or an unreasonable application of Supreme Court precedent. Petitioner is not entitled to relief on this claim.

X. Habeas Claim A(10) (Failure to Request Jury Instruction on Voluntary Intoxication and Lesser Offense of Manslaughter)—At paragraphs 77 through 81 of the petition, it is contended that counsel were ineffective because they failed to request jury instructions on voluntary intoxication as a factor that negates a specific intent, reducing the offense to manslaughter. Petitioner points out that ample evidence was presented at trial to show that petitioner was intoxicated at the time of the offense, yet counsel did not request or argue that his intoxication was sufficient to require an instruction concerning the effect of intoxication on the formation of a specific intent.

The Alabama Court of Criminal Appeals considered this claim in the Rule 32 appeal. It wrote:

> Likewise, the evidence presented at trial failed to support a jury instruction on voluntary intoxication. Evidence was admitted in the form of Jones's[sic] statement to law enforcement officers in which he admitted that he and Giles had been drinking rum and beer before going to the victims' house; however, such an admission does not prove that he was intoxicated. *Windsor v. State*, 683 So. 2d 1027 (Ala.Cr.App.1994), aff'd. 683 So. 2d 1042 (Ala. 1996), *cert.*

denied, 520 U.S. 1171, 117 S.Ct. 1438, 137 L.Ed. 2d 545 (1997). Additionally, although Charlie Nelson testified that Jones and his accomplice seemed "drunk" and although Jones admitted in his statement that he "was just so gone," when he stabbed the victims that he just closed his eyes and stabbed wildly, none of the evidence presented at trial indicated that he was so intoxicated that he could not form the requisite intent to sustain a conviction for murder. *Coon v. State*, 494 So. 2d 184, 188 (Ala.Cr.App.1986); *Lawrence v. State*, 341 So. 2d 188, 193 (Ala.Cr.App.1977) (holding "that voluntary drunkenness is not a defense to a criminal charge unless it is so extreme as to render impossible some mental condition which is an essential element of the criminal act"). The evidence here simply does not support such a charge.

At his Rule 32 hearing and on appeal, Jones contends that his trial counsel was [sic] ineffective for not presenting evidence that he was intoxicated at the time of the murders. Jones argues that the testimony of Glen Jones, his sister, would have established that he was intoxicated at the time of the murders. We agree with the trial court, however, that counsel made a strategic choice not to present this defense and not to call Glen Jones as a witness in the 1982 trial. Glen Jones testified during the 1979 trial. In her testimony she admitted that she allowed Jones to "shoot up" with drugs while her children were in her house. In addition to her character being challenged, her testimony was impeached and, consequently, led to the impli-

cation that Jones's accomplice did not have to coerce Jones to participate in the murders. As the trial court stated,

> "It is easy to see why counsel would be reluctant to call Glen Jones for the second trial after hearing her testimony from the first trial. . . . Since petitioner was convicted in his 1979 trial, trial counsel in the 1982 trial had good reason to avoid using Glen Jones as a witness. . . . In reviewing the testimony of Glen Jones, this Court is of the opinion that it was a sound strategic decision of trial counsel not to present Glen Jones as a witness at trial."

(C.R. 1059–60.)

Jones's[sic] trial counsel had knowledge of the previous trial and of the effectiveness at that trial of the testimony of various witnesses, especially the testimony of Glen Jones. Based on our review of the first trial, we cannot say that it was error for trial counsel not to present testimony from Glen Jones to establish Jones's intoxication, in light of the questionable credibility of her testimony in the previous trial. " '[I]f an attorney is aware of a line of defense and makes a conscious decision to reject it, rather than failing to raise it simply because he was aware that it existed, it is more likely that the failure to raise the defense was reasonable.' " *Cade v. State*, 629 So. 2d at 41–42, quoting, *Gates v. Zant*, 863 F.2d 1492, 1498 (11th Cir.), cert. denied, 493 U.S. 945, 110 S.Ct. 353, 107 L.Ed. 2d 340 (1989). Therefore, because trial counsel made a strategic choice

> not to present an intoxication defense, we do not conclude that Jones's trial counsel was ineffective for not presenting evidence of his voluntary intoxication, nor do we find error in their failure to request a charge on voluntary intoxication—the evidence simply did not support it.

Jones v. State, 753 So. 2d 1174, 1190–91 (Ala. Crim. App.), *cert. denied*, (Ala. 1999).

Section 2254(d)(1) provides that a federal habeas court may not grant relief with respect to any claim that was resolved by the state courts, unless that resolution is "contrary to" or "an unreasonable application" of Supreme Court precedent. Additionally, state court resolution of a claim is entitled to no deference if it "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *See* 28 U.S.C. § 2254(d)(2). Expressly stated in the resolution of this issue by the Alabama Court of Criminal Appeals is the finding of fact that petitioner's counsel actually considered and rejected the idea of offering the testimony of petitioner's sister, Glen Jones, because she made a bad witness in the 1979 trial. The evidence of this fact is fairly scant, if it exists at all, in the Rule 32 record, and it is unclear on what evidentiary basis the state courts relied in finding that counsel intentionally and strategically decided not to offer the testimony of Glen Jones with respect to petitioner's intoxication the night of the murders.

As Jack Davis was deceased at the time of the Rule 32 hearing, the only defense attorney available to testify about counsel's strategic and tactical decisions in the 1982 trial was George Boles. The only testimony Boles gave that relates at all to either an intoxication defense

or the testimony of Glen Jones is found at pages 147 and 148 of the Rule 32 hearing transcript, where the following occurred:

> Q: And some how [sic] or another you and Jack decided not to introduce any testimony from any family members; is that correct?
>
> A: There was not any testimony from family members introduced. My recollection, which is pretty sketchy because, again, this and everything else and goes back thirteen years, but that there was some problem with the family members at that time and there was some reason Jack didn't want to bring the family members into it. I don't remember what it was, Grant, but I just recall vaguely that there was some problem with family members.
>
> Q: Every family member that Aaron Jones had?
>
> A: All I'm telling you is that I remember Jack telling me that there was some problem of—I say I remember, but I have a recollection of some sort that Jack was saying that there was a problem with family members. I don't remember what it was, I don't remember who it was. At this time I couldn't tell you.
>
> Q: Did you know at that time who the family members were, sir?
>
> A: I'm not sure I did, at that time.
>
> Q: Did you know that Aaron Jones had a sister named Glen, sir?
>
> A: I don't know now what I knew then.

> Q: Do you have any recollection that Mr. Jones had a sister named Glen, sir?
>
> A: I don't recall now what I recalled then as to specific names and relationships.
>
> Q: Do you remember whether you knew that he had a sister at all, sir?
>
> A: No I do not recall now what I recalled or knew then.

Even this testimony appears to be in the context of questioning regarding decisions made in relation to the sentencing phase of the trial, not the guilt phase. But giving the testimony its best reading, it would appear that a court might infer from it that Jack Davis, being aware of Glen Jones' testimony in the 1979 trial, told George Boles that "family members" would be problematic witnesses to put on the stand. It is far from clear, however, that Davis and Boles specifically discussed Glen Jones as a witness or her ability to add testimony concerning the degree of intoxication petitioner was suffering the night of the murders, much less that they deliberately decided to forego her testimony on intoxication as a strategic choice. Thus, the court is troubled by the finding of fact made by the state courts on this claim, when the evidence supporting it is so scant and inconclusive. Such a finding may well be "an unreasonable determination of the facts in light of the evidence presented," depriving the state courts' resolution of this claim of any deference under § 2254(d).

Nevertheless, it is clear from the Rule 32 hearing testimony that the defense "theme" or strategy was to portray the defendant as a weak "follower," who was coerced by Giles, perhaps even at gunpoint, into participating in the murders and, therefore, was less cul-

pable than Giles and less deserving of the death penalty. Although evidence of intoxication would not have been inconsistent with this defense, and might even have bolstered it, the absence of intoxication evidence does not mean that counsel's representation of petitioner was constitutionally ineffective. Counsel identified and pursued a reasonable strategy, grounded in the evidence as they knew it, aimed at lessening the risk of getting the death penalty. While not a legal defense itself, this strategy addressed the most important concern at the time, whether the culpability of petitioner's participation was worthy of the death penalty.

Furthermore, evidence that petitioner was intoxicated *did* come out at trial, both in petitioner's own confession and in the testimony of prosecution witnesses, who described him and Giles as being "drunk" when they entered the Nelson home. To the extent this evidence aided the "weak follower/coercion" strategy, the jury had it to consider. Still, the state courts correctly concluded that the evidence did not establish that petitioner's intoxication was so extreme that he was unable to form the necessary criminal intent to kill, and thus that it was insufficient to rise to the level of requiring consideration of a lesser offense. Indeed, petitioner's own confession revealed that he retained enough presence of mind, despite his intoxication that night, to recall the events of the crime, indicating that his intoxication was not so great that he lacked the ability to form the necessary intent. In the absence of evidence establishing such extreme intoxication, it was not error for the trial court to decline to instruct the jury on the effect of voluntary intoxication. Further, because the trial court was under no obligation to give the instruction, counsel's failure to request it was not ineffective assistance because it resulted in no prejudice to the defense; that is, the peti-

tioner lost nothing to which he was entitled under the law. *See Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 844, 122 L.Ed. 2d 180 (1993) ("Unreliability or unfairness [as the measure of prejudice under *Strickland*] does not result if the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him"); *see also Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000). Petitioner is not entitled to relief on this claim.

XI. Habeas Claim A(11) (Failure to Object to a "Burden-Shifting" Jury Instruction)—Petitioner alleges at paragraphs 82 through 84 of the petition that he received ineffective assistance of counsel because his attorneys failed to object to the trial court's instruction on "malice" as an element of the capital charge. He contends that the court's instruction unconstitutionally shifted away from the prosecution the burden of proving malice, and placed the burden on petitioner to rebut it.

On appeal from denial of Rule 32 relief, the Alabama Court of Criminal Appeals reviewed the claim[13] that the instruction itself was a violation of due process. Rejecting that claim, the court wrote as follows:

> Jones contends that the trial court committed reversible error when it instructed the jury on the element of malice, because, he says, the instruction created a "mandatory presumption"

[13] Although the discussion of the "malice" instruction in the opinion of the Alabama Court of Criminal Appeals appears to be addressed to the substantive due process claim, it is found in a section of the opinion dealing with petitioner's claims of ineffective assistance of counsel. Thus, the actual claim of ineffective assistance due to the failure to object to an allegedly burden-shifting instruction was actually considered and resolved.

that relieved the state of its burden of persuasion of the element of malice and shifted that burden to him.

The trial court instructed the jury as follows:

> "Now, we have [a] statute which defines murder in the first degree. This statute says that every willful, deliberate, malicious and premeditated killing of a human being is murder in the first degree. Now I will undertake to define these four terms for you in order that you may better understand them, and in doing so, will use the language used by the Supreme Court many years ago.
>
> "Willful means governed by the will without yielding to reason. Deliberate means formed with deliberation in contradistinction to a sudden and rash act. Malice means done with a fixed hate or wicked intention or a motive, not the result of a sudden passion. That is the definition of actual malice. But the word malice, as used in this statute which defines murder, has a broader meaning than that. It includes, not only actual malice, but includes what we call legal or implied malice. And in the broader sense, it means the state or condition of the mind which prompted a person to do an unlawful act without legal justification or extenuation.
>
> "*Now every intentional and unlawful killing of a human being is presumed to be done with malice aforethought unless the*

> *circumstances that surround the killing rebut the idea of malice. Every intentional and unlawful killing of a human being with a deadly weapon, such as a pistol or with a knife, is presumed to be done with malice unless the evidence that proved the killing rebuts the presumption of malice.*"

(C.R. on Rule 32 683–685.) (R. on dir. app. 393–95.)

This court has written:

> " 'Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an "ultimate" or "elemental" fact—from the existence of one or more "evidentiary" or "basic" facts. *E.g.*, *Barnes v. United States*, 412 U.S. 837, 843–844 [93 S.Ct. 2357, 2361–62, 37 L.Ed. 2d 380] [(1973)]; *Tot v. United States*, 319 U.S. 463, 467 [63 S.Ct. 1241, 1244, 87 L.Ed. 1519] [(1968)]; *Mobile, Jackson & K.C.R. Co. v. Turnipseed*, 219 U.S. 35, 42 [31 S.Ct. 136, 137, 55 L.Ed. 78] [(1910)]. The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however, depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's

constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358, 364 [90 S.Ct. 1068, 1072, 25 L.Ed. 2d 368] [(1970)]; *Mullaney v. Wilbur*, 421 U.S. [684,] at 702–703, n. 31 [95 S.Ct. 1881, 1891–92, n. 31, 44 L.Ed. 2d 508] [(1975)].

" 'The most common evidentiary device is the entirely permissive inference or presumption, which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. *See, e.g., Barnes v. United States*, supra, [412 U.S.], at 840 n. 3 [93 S.Ct. at 2360 n. 3]. . . . Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

" 'A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the "no reasonable doubt" burden but also the placement of that burden; it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. *E.g.*, *Turner v. United States*, [396 U.S. 398,] 401–402, and n. 1 [90 S.Ct. 642, 644–45, 24 L.Ed. 2d 610 (1970)]; *Leary v. United States*, 395 U.S. 6, 30 [89 S.Ct. 1532, 1545, 23 L.Ed. 2d 57] [(1969)]; *United States v. Romano*, 382 U.S. 136, 137, and n. 4, 138, 143 [86 S.Ct. 279, 280, and n. 4, 280, 283, 15 L.Ed. 2d 210] [(1965)]; *Tot v. United States*, supra [319 U.S.], at 469 [63 S.Ct. at 1245]. In this situation, the Court has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide. *E.g.*, *Turner v. United States*, supra [396 U.S.], at 408–418 [90 S.Ct. at 648–53]; *Leary v. United States*, supra [395 U.S.], at 45–52 [89 S.Ct. at 1552–57]; *United States v. Romano*, supra [382 U.S.], at 140–41 [86 S.Ct. at 281–82); *Tot v. United States*, 319 U.S., at 468 [63 S.Ct., at 1245]. To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's

> constitutional validity is logically divorced from those facts based on the presumption's accuracy in the run of cases. It is for this reason that the Court has held it irrelevant in analyzing a mandatory presumption, but not in analyzing a purely permissive one, that there is ample evidence in the record other than the presumption to support a conviction. *E.g.*, *Turner v. United States*, 396 U.S., at 407 [90 S.Ct., at 647]; *Leary v. United States*, 395 U.S., at 31–32 [89 S.Ct., at 1545–46]; *United States v. Romano*, 382 U.S. at 138–139 [86 S.Ct. at 280–81].' " *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 156–60, 99 S.Ct. 2213, 2224–26, 60 L.Ed. 2d 777 (1979) (footnotes omitted, emphasis in original)."

Beard v. State, 612 So. 2d 1335, 1342–43 (Ala.Cr.App.1992). *See also Manuel v. State*, 711 So. 2d 507 (Ala.Cr.App.1997).

Here, the predicate fact supporting the presumption is Jones's intentional and unlawful killings of the victims with a deadly weapon, i.e., a knife. The presumed fact that the jury was instructed to conclude from proof of the killings is that Jones committed the murders with malice aforethought. However, in order for the jurors to reach that conclusion, the State had to prove that Jones killed the victims intentionally and that the circumstances of the killings evidenced that Jones acted with malice aforethought. We do not find that the trial court's instruction shifted the State's burden to

establish the element of malice to Jones. In this situation, the permissive presumption " '[did] not relieve the state of its burden of persuasion because the presumption still require[d] the state to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved.' " *Beard*, 612 So. 2d at 1343, quoting *Francis v. Franklin*, 471 U.S. 307, 314, 105 S.Ct. 1965, 1971, 85 L.Ed. 2d 344 (1985).

Therefore, we conclude that the instruction could not reasonably be read, as Jones suggests, as instructing the jury that it was required to infer or presume the element of malice aforethought in the absence of evidence from Jones presented evidence that such a presumption was unwarranted. Consequently, we do not consider the trial court's instruction violative of the Due Process Clause of the Fourteenth Amendment, which "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed. 2d 368 (1970). Because we do not believe that a reasonable juror could have interpreted this instruction as relieving the prosecution of its burden of persuasion on each essential element of the charged capital murder, we find no error. Moreover, the trial court also gave a charge concerning the defendant's presumption of innocence and the State's burden of proof. Therefore, when considering the jury instruction in its entirety, the error, if any, was cured by the additional charges. *Hubbard v. State*, 584

> So. 2d 895 (Ala.Cr.App.1991), cert. denied, 502 U.S. 1041, 112 S.Ct. 896, 116 L.Ed. 2d 798 (1992); *Sims v. State*, 386 So. 2d 767 (Ala.Cr.App. 1980) (holding that trial court's instruction on malice did not shift the State's burden of proof to the defendant).
>
> Because Jones has failed to establish that the trial court's instruction on malice constituted error, he has failed to show that his trial counsel was ineffective for failing to challenge this instruction. [Italics added].

Jones v. State, 753 So. 2d 1174, 1187–89 (Ala. Crim. App.), *cert. denied*, (Ala. 1999).

Although the court is not persuaded that all of the reasoning used by the Alabama Court of Criminal Appeals to arrive at the conclusion that no ineffective assistance occurred is correct,[14] the court does agree ultimately that

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[14] While perhaps not necessary to catalogue all of the concerns this court has with the reasoning of the Court of Criminal Appeals, it is worth noting some parts of the rationale that seem "contrary" to or an "unreasonable application" of such Supreme Court precedent as *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed. 2d 39 (1979) and *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed. 2d 344 (1985). For example, the state appellate court concluded that the instruction in this case involved merely a permissive inference, not a mandatory presumption. However, the Supreme Court emphasized in *Sandstrom* and *Francis* that the use of the words "presume" or "presumption" imply a mandatory finding, not merely a permissive inference the jury may or may not draw. As the Supreme Court noted in *Francis*:

> The challenged sentences are cast in the language of command. They instruct the jury that "acts of a person of sound mind and discretion are *presumed* to be the product of the person's will," and that a person "*is presumed* to intend the natural and probable consequences of his acts," App. 8a–9a (emphasis added). These words carry pre-

petitioner did not receive ineffective assistance due simply to counsel's failure to object to the trial court's malice instruction. This court agrees that no ineffective assistance in this regard occurred for two reasons. First, the instruction did not really relieve the State of the burden of proving all elements of the offense of capital murder; and, second, if the instruction was error, it was harmless error in light of the overwhelming evidence against petitioner. Under either rationale, counsel's fail-

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> cisely the message of the language condemned in *Sandstrom*, 442 U.S., at 515, 99 S.Ct., at 2454 (" 'The law presumes that a person intends the ordinary consequences of his voluntary acts' "). [Italics in original].

Id. at 316. Consequently, it is difficult to say that the conclusion reached by the state appellate court is not "contrary to" *Francis*. Likewise, the state court concluded that general instructions about the defendant's presumption of innocence and the state's burden of proof cured any defect in this particular instruction on malice. Again, both *Sandstrom* and *Francis* rejected the notion that such general instructions are adequate to cure a specific burden-shifting instruction. The Court explained in *Francis*, as follows:

> As we explained in *Sandstrom*, general instructions on the State's burden of persuasion and the defendant's presumption of innocence are not "rhetorically inconsistent with a conclusive or burden-shifting presumption," because "[t]he jury could have interpreted the two sets of instructions as indicating that the presumption was a means by which proof beyond a reasonable doubt as to intent could be satisfied." 442 U.S., at 518–519, n. 7, 99 S.Ct., at 2456, n. 7. . . . These general instructions as to the prosecution's burden and the defendant's presumption of innocence do not dissipate the error in the challenged portion of the instructions.

Id. at 319–320. Thus, again, the conclusion that general burden of proof instructions cured the defect in this burden-shifting instruction is "contrary to" *Francis*.

ure to object to the malice instruction caused no prejudice to the defense.

Insofar as the Alabama Court of Criminal Appeals concluded that the particular instruction on malice did not relieve the State of the burden of proving every element of capital murder, it is correct. Recall that the instruction was as follows:

> Now every intentional and unlawful killing of a human being is presumed to be done with malice aforethought unless the circumstances that surround the killing rebut the idea of malice. Every intentional and unlawful killing of a human being with a deadly weapon, such as a pistol or with a knife, is presumed to be done with malice unless the evidence that proved the killing rebuts the presumption of malice.

Further, Alabama law defines malice in this context as "the state or condition of the mind which prompted a person to do an unlawful act without legal justification or extenuation." Under the court's instruction, the jury "presumed" malice, that is, that the murders were done with a recognition that they were "without legal justification or extenuation," only after finding first that the killings were "*intentional* and *unlawful.*" [Italics added]. The state always retained the burden of proving both that the killings were intentionally done by petitioner and that they were unlawfully done by him. The jury's finding that the killings were intentional and unlawful was, in effect, a finding of malice, notwithstanding the presumption contained in the instruction.

Finally, coupling the explicit placement of the burden of proving intentional and unlawful killings on the state with the concluding phrase of the instruction that malice is presumed "unless the evidence that proved the killing

rebuts the presumption of malice," it becomes apparent that the instruction always required the *State's* evidence to prove malice. If the "evidence that proved the killing," that is, the *State's* evidence, failed to show malice, then the presumption was rebutted. The instruction never required the petitioner to offer any rebutting evidence; rather, it lay entirely in the State's burden of proof. Thus, the instruction did not shift the burden to the petitioner and, therefore, was not objectionable.

Even if the instruction can be regarded as a burden-shifting instruction in violation of *Sandstrom* and *Francis*, the error in this case was harmless. *See Rose v. Clark*, 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed. 2d 460 (1986). The overwhelming evidence against petitioner showed that he went to the Nelson home with Giles for the purpose of robbing them. He was armed with a gun and, when the gun proved unusable, he stabbed the Nelsons multiple times with a butcher knife retrieved from their kitchen. There can be no reasonable doubt that petitioner acted with the requisite malice, that is, recognition that he acted without legal justification or extenuation. As the malice instruction constituted harmless error, counsel's failure to object to it does not undermine confidence in the outcome of petitioner's trial; his trial remained fundamentally fair, despite this error. Thus, without prejudice, there was no ineffective assistance of counsel, and petitioner is not entitled to relief on this claim.

XII. Habeas Claim A(12) (Failure to Adequately Support Motion for Change of Venue)—At paragraph 85 of the petition, it is alleged, as follows:

> Trial counsel failed to adequately seek and present evidence in support of a change of venue so that the strong community sentiment against

> Mr. Jones and highly prejudicial publicity surrounding the crime and which attended the 1979 trial could be minimized or a fair trial obtained. In marked contrast to trial counsel for his codefendant, Arthur Lee Giles, trial counsel failed to seek funds which would have allowed him to commission a survey in support of a change of venue.

This claim was raised in the Rule 32 proceedings, in which the Alabama Court of Criminal Appeals found, as to this and several other claims of ineffective assistance, that petitioner failed to offer evidence at the Rule 32 hearing showing either that counsel's decisions were beyond the broad scope of competence expected under the Sixth Amendment or that they prejudiced the defense. *Jones v. State*, 753 So. 2d 1174, 1199 (Ala. Crim. App.), *cert. denied* (Ala. 1999). The state appeals court held, "Jones has not shown 'by a preponderance of the evidence the facts necessary to entitle [him] to relief' on any issue concerning the ineffectiveness of his trial counsel." Because petitioner had an opportunity to prove this claim in state court proceedings, he cannot offer additional evidence in support of the claim in these proceedings without satisfying Section 2254(e)(2)'s conditions. *Michael Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed. 2d 435 (2000); 28 U.S.C. § 2254(e)(2).

Looking to the *Strickland* standard, the court cannot say that this conclusion is contrary to or an unreasonable application of Supreme Court precedent. The evidence presented during the Rule 32 hearing failed to show that counsel acted outside the broad scope of competence expected of counsel at the time of the 1982 trial. The murders occurred in 1978. No evidence was presented during the Rule 32 proceedings to show that there was

widespread publicity or public passion when the trial took place four years later, in 1982. Indeed, the many newspaper articles offered by the petitioner at the Rule 32 hearing to prove widespread publicity dated from 1978 and 1979. At the time of the 1982 trial, there were only a few, very short news articles dealing with the trial. Thus, by 1982, the publicity surrounding the murders and the trial had greatly abated, and there was no other evidence to suggest an aroused public passion about the case. Even if counsel can be faulted for failing to make a stronger showing on petitioner's motion for change of venue, he suffered no prejudice at trial because there was no basis for changing venue. At the time of the 1982 trial, there simply was no wide-spread publicity or public passion about the case. Petitioner is not entitled to relief on this claim.

XIII. Habeas Claim A(13). (Failure to More Adequately Cross-Examine Prosecution Witnesses)—Paragraph 86 of the petition asserts:

> Trial counsel failed to investigate and adequately cross-examine crucial state witnesses whose testimony had to be challenged to protect Mr. Jones' interest and rights. These witnesses include Tony Nelson, Charlie Nelson, Brenda Nelson and the police officers who took Mr. Jones' confession.

Petitioner's brief in opposition to summary disposition of this case does not address this particular claim; nowhere is there any elaboration on what petitioner contends his trial attorneys did or failed to do in examining these witnesses.[15] Thus, the court is left with nothing

[15] Under a discussion of the claim that counsel were ineffective for failing to present the defense that the victims were already dead when petitioner stabbed them, the brief does discuss how the testi-

more than this bare allegation in the petition. Such vague allegations are insufficient to warrant habeas relief. *See Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978).[16]

On appeal from denial of Rule 32 relief, the Alabama Court of Criminal Appeals concluded that petitioner failed to carry his burden of proving either deficient performance by counsel or prejudice on this claim. Because petitioner had an opportunity to prove this claim in state court proceedings, he cannot offer additional evidence in support of the claim in these proceedings without satisfying Section 2254(e)(2)'s conditions. *Michael Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L. Ed. 2d 435 (2000); 28 U.S.C. § 2254(e)(2).

Without more, this court cannot say that the state appellate court's resolution of this claim was contrary to or an unreasonable application of the *Strickland* standard. *Strickland* does not require perfect representation, only constitutionally adequate representation. The cross-examination of witnesses is an art, not a science, performed in different ways with different philosophies by equally accomplished trial lawyers. This is particularly true in a case like this, in which counsel were called upon to cross-examine teenagers (Charlie and Brenda Nelson) about the murder of their parents, witnessed when they were but children, and who suffered atrocious and traumatic wounds themselves. Counsel had to bal-

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mony of Brenda Nelson can be read to support such a defense. (Doc. 22, at pp.47-48). There is no discussion, however, regarding counsel's alleged shortcomings in cross-examining Brenda Nelson or any other witness.

[16] In *Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 (11th Cir. 1981)(*en banc*), the Eleventh Circuit adopted as binding precedent the decisions of the old Fifth Circuit Court of Appeals rendered before October 1, 1981.

ance delicately the search for truth in their testimony without bullying them or otherwise alienating the jury by appearing less than sympathetic to their pain. It would have been entirely reasonable for counsel to avoid being confrontational with these witnesses and to limit cross-examination to "safe" areas, rather than risk angering the jury with a perception of insensitivity to them. Nevertheless, the state appellate court found the record to support the trial court's finding that:

> Boles aggressively attacked the witnesses' versions of events. Counsel impeached Brenda Nelson with prior inconsistent statements that she had made. In fact, counsel had admitted prior inconsistent statements over the objections of the State and prevented the State from admitting into evidence the entirety of her statements.

Jones v. State, 753 So. 2d 1174, 1183 (Ala. Crim. App.), *cert. denied*, (Ala. 1999). Further, the court found that, "Counsel also vigorously opposed the admission of Jones' confession during the hearing on the motion to suppress and during the testimony of the State's witnesses before the jury." *Id.* These conclusions are fairly based on the record of the trial.

All of this is to say, simply, that the strategy and tactics of cross-examination cannot be so easily labeled "right" or "wrong," or found wanting after the fact with the benefit of hindsight and second-guessing. Without some clearer showing by petitioner of an error or shortcoming in the cross-examination of witnesses by counsel, an error so egregious that no reasonable attorney would have made it, the court cannot say that counsel was ineffective or that the resolution of this claim by the state courts is contrary to or an unreasonable application

of the *Strickland* standard. Petitioner is entitled to no relief on this claim.

XIV. Habeas Claim A(14) (Failure to Object to Improper Comments by the Prosecutor Relating to Petitioner's Right to Remain Silent)—At paragraph 87 of the petition, it is alleged:

> Trial counsel failed to object to the prosecutor's highly improper closing argument at both the guilt/innocence and sentencing stages. In particular, trial counsel failed to object to the prosecutor's use of the phrases "blood-thirsty savage" (R. 462) and "blood-thirsty murderer" (*id.*) and failed to object when the prosecution impermissibly commented on Mr. Jones' right not to take the stand during the guilt phase of the trial.

As is true of the immediately preceding claim, this claim is not addressed by petitioner in his brief, and the court is left with nothing but this bare allegation. Of course, the claim that counsel was ineffective for failing to object to comments calling petitioner a "blood thirsty savage" and a "blood thirsty murderer" was addressed above under Habeas Claim A(6) and will not be repeated. The court will focus hers on whether counsel was ineffective for failing to object to the prosecutor's comments about petitioner's right not to take the stand to testify.

This same claim was raised in the Rule 32 petition, and the Alabama Court of Criminal Appeals concluded that petitioner failed to carry his burden of proving either deficient performance by counsel or prejudice. Because petitioner had an opportunity to prove this claim in state court proceedings, he cannot offer additional evidence in support of the claim in these pro-

ceedings without satisfying Section 2254(e)(2)'s conditions. *Michael Williams v. Taylor*, 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed. 2d 435 (2000); 28 U.S.C. § 2254(e)(2).

This court cannot say that such resolution of the claim was contrary to or an unreasonable application of the *Strickland* standard. The court has carefully reviewed the closing arguments of all counsel in both the guilt and sentencing phases of the trial, and has been unable to identify any argument in which a prosecutor commented on the petitioner's failure to take the stand or his right not to testify. Because it does not appear that any improper comment was made along these lines, counsel were not ineffective for failing to object; there was nothing to object to. Consequently, the resolution of this claim by the Alabama Court of Criminal Appeals is not contrary to or an unreasonable application of Supreme Court precedent. Petitioner is not entitled to relief on this claim.

Ineffective Assistance of Appellate Counsel

At paragraphs 89 through 97 of the petition, it is alleged that petitioner received ineffective assistance from counsel on appeal, Mr. Boles. (Habeas Claim B). Petitioner notes that counsel unsuccessfully asked the trial judge to be relieved of prosecuting the appeal and that the appellate brief he filed was only eight pages. He argues that this indicated that counsel abdicated his duty to advocate effectively for petitioner on appeal. He criticizes the three issues raised by counsel on appeal, asserting that a number of constitutional issues could have been raised, but were not. The only issues identified by petitioner that *should* have been raised on appeal (but were not) are (i) the lack of a jury instruction on

intoxication and the lesser included offense of manslaughter; (ii) the failure of the trial court to give an instruction on the particularized intent requirement for a capital murder conviction; and (iii) the trial court's erroneous burden-shifting instruction. Without a clearer exposition of issues petitioner alleges should have been presented on appeal, the court will restrict its analysis of the ineffective assistance claim to these issues. Otherwise, vague claims are insufficient to warrant habeas relief. *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978).

Claims for ineffective assistance of appellate counsel are analyzed under the same *Strickland* standard as is applicable to trial ineffectiveness. *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. 2001); *Clark v. Crosby*, 335 F.3d 1303 (11th Cir. 2003). In *Johnson*, the court of appeals observed:

> It is difficult to win a *Strickland* claim on the grounds that appellate counsel pressed the wrong legal arguments where the arguments actually pursued were reasonable in the circumstances. We have emphasized that even in a death penalty case, counsel must be "highly selective about the issues to be argued on appeal. . . ." *United States v. Battle*, 163 F.3d 1, 1 (11th Cir. 1998). The district court, having considered the record and [counsel's] testimony during the state post-conviction proceeding, found that [counsel] had carefully considered many of the claims now raised in appeal, but ultimately chose to pursue the claims he felt were most likely to prevail and winnow out the arguments he thought were less persuasive.

Id. at 1188. Thus, keeping in mind the presumption of reasonableness favoring the decisions of counsel, a claim of ineffective assistance of appellate counsel will fail unless the petitioner can establish that counsel's choice of issues to raise on appeal was unreasonable under the circumstances. The fact that potentially meritorious issues were not raised on appeal does not establish, by itself, ineffectiveness. Rather, the court must assess whether any reasonable attorney would have chosen the issues raised in lieu of the omitted issues. If so, counsel's choice of issues cannot be second-guessed. Likewise, issues lacking merit cannot establish the requisite prejudice under the *Strickland* standard.

Turning to the facts of this particular case, petitioner contends that appellate counsel was ineffective because he chose to raise issues lacking any apparent merit while ignoring others more likely to succeed on appeal. Petitioner claims that his appellate lawyer should have argued three particular issues[17] on appeal, rather than the ones he chose.

Petitioner raised this claim in the Rule 32 petition and it was explored at the evidentiary hearings on that petition. On appeal from denial of Rule 32 relief, the Alabama Court of Criminal Appeals concluded:

> Jones contends that his appellate counsel, who was the same counsel who represented him at trial, rendered ineffective assistance. Jones

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[17] Although petitioner contends that counsel overlooked a multitude of meritorious issues, he explicitly identifies only three: (i) the lack of a jury instruction on intoxication and the lesser included offense of manslaughter; (ii) the failure of the trial court to give an instruction on the particularized intent requirement for a capital murder conviction; and (iii) the trial court's erroneous burden-shifting instruction. Because the *Strickland* standard requires a habeas petitioner to identify the particular error or shortcoming of counsel, the

claims that his appellate counsel failed to "recognize at least some of the real grounds for an effective appeal." (Appellant's brief at p. 43.) Specifically, he argues that his appellate counsel should have raised the following issues:

> 1. The failure to give a jury charge on intoxication and on the lesser included offense of manslaughter;
>
> 2. The trial court's omission of the required particularized intent instruction; and
>
> 3. The trial court's erroneous burden-shifting instruction.

However, because we have addressed these issues in light of Jones's claim of ineffective assistance of trial counsel and found that they did not constitute reversible error, Jones's appellate counsel cannot be held to be ineffective for failing to argue these issues on appeal. Moreover, at the conclusion of our affirmance of Jones's direct appeal, we stated: "In accordance with Rule 45A, Ala.R.App.P., we have carefully reviewed the record for any errors which would have adversely affected the rights of the appellant and found none." *Jones v. State*, 520 So. 2d at 549. While we acknowledge that Jones's appellate counsel may have made decisions that Jones now questions, we do not find that Jones's appellate counsel was ineffective.

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court will consider the ineffectiveness claim only within the context of whether the failure to assert these three issues was unreasonable. The court has no way of assessing the reasonableness of not presenting other, unidentified claims.

Jones v. State, 753 So. 2d 1174, 1199–1200 (Ala. Crim. App.), *cert. denied*, (Ala. 1999). This conclusion is entitled to a presumption of correctness under 28 U.S.C. § 2254(d), as discussed above, unless petitioner can show that it is "contrary to or an unreasonable application of" the *Strickland* standard.

This court agrees with the Alabama Court of Criminal Appeals that counsel was not ineffective for failing to raise these particular issues on direct appeal. As that court noted and this court has further explained, none of these three issues was meritorious. Counsel's decision to forego raising the intoxication/lesser-included manslaughter issue was reasonable. The evidence of voluntary intoxication was not great enough to warrant a finding that petitioner was incapable of forming the necessary intent to commit a capital crime. His clear recollection of the events, recounted in the statement he made to police, belies a level of intoxication profound enough to prevent him front forming an intent to commit these murders. Given the uncertain potential of the claim, it was not unreasonable for counsel to elect not to pursue it as an appellate issue.

Likewise, the two other issues identified by petitioner did not have sufficient merit to be critical of counsel for failing to argue them on appeal. This court has discussed at length above how neither of these claims constituted error by the trial court, a conclusion found explicitly by the Alabama Court of Criminal Appeals. Because there was no error in the trial court's jury instruction, there was no ground on which appellate counsel could make an appeal issue. His failure to do so, even if not the product of a strategic choice, caused no prejudice to the defense; consequently, there was no ineffective assistance of appellate counsel warranting the issuance of the writ.

Because the conclusion of the Alabama Court of Criminal Appeals, that there was no ineffectiveness because there was no error in the challenged instructions, was not "contrary to" or an "unreasonable application of" the *Strickland* standard, it is entitled to a presumption of correctness under § 2254(d). The court is precluded from granting habeas relief by the express terms of AEDPA under these circumstances. This claim, therefore, is due to be denied.

Consideration of Mitigating Circumstances

At Habeas Claim C, paragraphs 98 and 99, petitioner alleges that the state trial and appellate courts failed to consider adequately both statutory and non-statutory mitigating circumstances. Paragraph 98 reads:

> The Circuit Court found no mitigating circumstances to exist in this case. There were clearly mitigating circumstances evident from the record. Nevertheless, the Alabama appellate courts found appropriate the trial court's refusal to find mitigating circumstances. The Circuit Court and the Alabama appellate court failed to adequately consider both statutory and non-statutory mitigating circumstances. The Circuit Court and the Alabama appellate courts put undue importance on statutory mitigating circumstances only instead of considering Mr. Jones' particular mitigating circumstances. This was in violation of Mr. Jones' Eight and Fourteenth Amendment rights.

Paragraph 99 argues that, to the extent the State contends this claim is procedurally defaulted, petitioner alleges that ineffective assistance of trial and appellate

counsel constitutes "cause and prejudice" sufficient to excuse the default.

This claim was pled as claim E in the Rule 32 petition, and the Alabama Court of Criminal Appeals found that it was procedurally defaulted because it *was raised* at trial and on direct appeal. *Jones v. State*, 753 So. 2d 1174, 1205 (Ala. Crim. App.), *cert. denied*, (Ala. 1999).[18] Aside from the somewhat odd notion that petitioner could raise in the trial court a claim that the state *appellate* courts failed to consider mitigating evidence, the claim appears to be exhausted[19] and ripe for consideration by this court.

The direct appeal of this case makes clear that both the trial and appellate court adequately and fairly con-

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[18] In its published Rule 32 opinion, the Court of Criminal Appeals wrote:

> We find that the following claims in Jones's [sic] petition are procedurally barred under Rules 32.2(a) (2) and (4), Ala.R.Crim.P., because they were raised and addressed at trial and on direct appeal:
>
> * * *
>
> 2. Jones's [sic] claim that the trial court's and appellate court's failure to consider mitigating evidence that was clear from the record violated Alabama law and his rights under the Eighth and Fourteenth Amendments to the United States Constitution. *Jones v. State*, 520 So. 2d at 555.

[19] Even though the Alabama Court of Criminal Appeals concluded that the claim was procedurally defaulted, the nature of the default does not preclude this court from considering the claim on the merits. The state court found that the claim could not be considered in the Rule 32 proceedings because it had been raised and addressed on direct appeal. This, of course, necessarily means that the claim also was exhausted for habeas purposes. Once a claim has been exhausted on direct appeal, it need not be exhausted a second time in a post-conviction petition.

sidered the mitigating circumstances existing in the record at the time sentence was imposed. It must be remembered that much of what petitioner now presents as mitigating evidence—his mental health history and his abusive childhood—was not presented to the trial court or argued on appeal. As discussed above, counsel chose to focus their penalty phase arguments on the assertion that petitioner was coerced into the crime by his co-defendant, Giles, and on a lingering doubt about whether the victims were already dead when petitioner stabbed them. These factors, as well as petitioner's intoxication, were considered as potential mitigation, but found insufficient to overcome the aggravating circumstances of the crime. Upon remand from the Alabama Court of Criminal Appeals, the trial court wrote the following:

> This case was remanded by the Court of Criminal Appeals with instructions and directions to the trial Court to extend its sentencing order heretofore entered on December 28, 1982.
>
> The Court hereby extends said order as follows:
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> The Court found aggravating circumstances as follows:
>
> (1) The defendant was previously convicted of a felony involving violence to the person;
>
> (2) The defendant knowingly created a great risk of death to many persons;
>
> (3) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or in an attempt to commit robbery;

(4) The capital felony was especially heinous, atrocious or cruel.

The Court having considered all the statutory mitigating circumstances under *Alabama Code*, 13A–5–51, and any additional mitigating evidence offered and further after consideration of all the matters that were presented to the Court during any of the hearings both in mitigation and by aggravation, and taking into consideration all matters that were properly before the Court as hereinabove stated, this Court finds and is convinced beyond a reasonable doubt and to a moral certainty that no mitigating circumstances exist.

That no mitigating circumstance exist to outweigh the unlawful, intentional and malicious killing of Carl Nelson and Willene Nelson by shooting them with a pistol or cutting them with a knife, and that the aggravating circumstances are sufficient to uphold the jury's verdict.

Jones v. State, 520 So. 2d 543, 552–53 (Ala. Crim. App. 1985), *aff'd*, 520 So. 2d 553 (Ala. 1988). On return to remand, following these findings by the trial court, the Alabama Court of Criminal Appeals held:

> We have also independently weighed the aggravating and mitigating circumstances in this case and we are convinced that, without a doubt, the death penalty was a proper sentence. The facts of the capital offense are especially heinous, atrocious and cruel. The victims of appellant's execrable crime were not only shot several times by appellant's partner, but they were barbarously and ferociously stabbed numerous

> times by both the assailants and two of the victims died as a result of the injuries inflicted.
>
> The facts indicate that appellant's previous felony conviction was for a crime in which he was only an accomplice; nevertheless, a jury heard the evidence against the appellant and convicted him of murder in the second degree and subsequent to that conviction he pled guilty to assault. The sentence he received for the prior conviction and guilty plea were served concurrently. Thus, the prior convictions were properly considered by the trial judge in assessing appellant's proper punishment in the case at bar. There is no concrete evidence to support the proposition that appellant was under extreme mental and emotional stress during the criminal actions. Nor can we give any credence to the belief that the appellant was a mere bystander or accomplice in the massacre of the victims, and that his involvement was relatively minor. Any additional statutory or non-statutory mitigating circumstances are not present in this case. Consequently, we find that any mitigating circumstances, if they exist at all, do not outweigh the aggravating circumstances present in this case.

Jones v. State, 520 So. 2d 543, 550 (Ala. Crim. App. 1985), *aff'd*, 520 So. 2d. 553 (Ala. 1988).

On direct appeal, the Alabama Supreme Court also addressed the argument that the trial court failed adequately to consider mitigating evidence. It wrote:

> Jones's [sic] final argument is likewise ill-founded. He claims that the circuit judge ignored the mitigating factors surrounding the

crime and pointed out only aggravating factors in his sentencing order on remand. The circuit judge found that the aggravating circumstances were:

> 1. The defendant was previously convicted of a felony involving violence to the person;
>
> 2. The defendant knowingly created a great risk of death to many persons;
>
> 3. The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or in an attempt to commit robbery;
>
> 4. The capital felony was especially heinous, atrocious or cruel.

After reviewing the evidence, the circuit judge concluded that there were no mitigating factors to be considered in sentencing. Jones claims that he was intoxicated at the time and that the other culprit involved, Arthur Giles, made him do it. Although Charlie Nelson, a victim of the crime who was 11 years old at the time, testified that he thought Jones was intoxicated and that he heard Arthur Giles tell Jones what to do, we find that it was not improper for the trial court to conclude that these did not constitute mitigating factors under the circumstances. Ala.Code 1975, § 13–11–7, sets out the statutory mitigating circumstances to be considered by the judge in sentencing. [Footnote omitted] The judge considered these factors and found none of them applicable in this case. In reviewing the record, he found no other factors that

> would weigh against the four aggravating circumstances. He concluded that the evidence was sufficient to uphold the jury verdict and imposed a sentence of death.
>
> Having considered the petition, the briefs, the opinion below, and the record itself, we are of the opinion that the judgment of the Court of Criminal Appeals is due to be, and it is hereby, affirmed.

Ex parte Jones, 520 So. 2d 553, 555 (Ala. 1988).

The claim now before the court is that the trial and appellate courts failed to consider adequately evidence of mitigation that was apparent in the record. The above-recited history of the direct appeal refutes the claim. The Alabama Court of Criminal Appeals remanded the case to the trial court for the very purpose of requiring the trial court to consider and address the aggravating and mitigating circumstances in the case. The trial court did so, and the Court of Criminal Appeals independently addressed them after remand. Finally, the Alabama Supreme Court also considered whether petitioner's intoxication or his deference to Giles were, in fact, mitigating circumstances. Plainly, the trial and appellate courts adequately considered the evidence presented, but concluded simply that the evidence did not establish mitigating circumstances.

To the extent this claim is intended to raise the issue that the state courts erred in concluding that this evidence did not establish mitigating circumstances, petitioner is not entitled to habeas relief on this claim under § 2254(d) unless the conclusion reached by the state courts was contrary to or an unreasonable application of Supreme Court precedent. Petitioner has not pointed the court to any Supreme Court precedent, and the court has

found none, holding that intoxication similar to that in this case constitutes a mitigating circumstance, or that similar deference to a co-defendant is a mitigating circumstance.[20] The conclusion reached by the state courts, therefore, was not objectively unreasonable. The evidence indicated that petitioner was not so intoxicated that he did not know what he was doing; indeed, he was sober enough to recall and relate his actions later. Nor does the evidence establish that petitioner was incapable of making his own voluntary choice of participating in this crime; his will was not overborne by Giles. Thus, it cannot be said that the resolution reached by the state courts was either contrary to or an unreasonable application of Supreme Court precedent. This claim is due to be denied.

Procedurally Defaulted Claims

It is clear that certain claims asserted here are procedurally defaulted. Specifically, all or portions of habeas claims D, E, F, G, and H are defaulted and cannot be considered on their merits absent a showing of "cause and prejudice" or that a "fundamental miscarriage of justice" will occur if they are not considered.

Procedural default is the manner in which the habeas requirement of exhaustion of state remedies is enforced. *Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001) ("The teeth of the exhaustion requirement comes from its handmaiden, the procedural default doctrine"). Before a federal habeas court may consider the merits of a claim, the state courts first must be given the oppor-

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[20] Again it should be remembered that no evidence was presented to the state courts concerning defendant's mental health or his allegedly abusive childhood.

tunity to address and cure any constitutional defect that may exist in the conviction or sentence. The United States Court of Appeals for the Eleventh Circuit has stated:

> The federal courts' authority to review state court criminal convictions pursuant to writs of habeas corpus is severely restricted when a petitioner has failed to follow applicable state procedural rules in raising a claim, that is, where the claim is procedurally defaulted. Federal review of a petitioner's claim is barred by the procedural default doctrine if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, *Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed. 2d 308 (1989), and that bar provides an adequate and independent state ground for denying relief. *See id.* at 262, 109 S.Ct. at 1042–43; *Johnson v. Mississippi*, 486 U.S. 576, 587, 108 S.Ct. 1981, 1987, 100 L.Ed. 2d 575 (1988). The doctrine serves to ensure petitioners will first seek relief in accordance with state procedures, *see Presnell v. Kemp*, 835 F.2d 1567, 1578–79 (11th Cir. 1988), *cert. denied*, 488 U.S. 1050, 109 S.Ct. 882, 102 L.Ed. 2d 1004 (1989), and to "lessen the injury to a State that results through reexamination of a state conviction on a ground that a State did not have the opportunity to address at a prior, appropriate time." *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 1470, 113 L.Ed. 2d 517 (1991).

Johnson v. Singletary, 938 F.2d 1166, 1173 (11th Cir. 1991); *see also Bailey v. Nagle*, 172 F.3d 1299, 1302

(11th Cir. 1999) ("A state habeas corpus petitioner who fails to raise his federal claims properly in state court is procedurally barred from pursuing the same claim in federal court absent a showing of cause for and actual prejudice from the default"). Thus, if a claim has been presented in some form previously to a state court, a federal habeas court may refuse to hear that claim only if the last state court rendering the judgment " 'clearly and expressly' states that its judgment rests on a state procedural bar." *Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 103 L.Ed. 2d 308, 317 (1989). The stated bar also must be "independent and adequate," as determined under federal law. *See Lee v. Kemna*, 534 U.S. 362, 376, 122 S.Ct. 877, 151 L.Ed. 2d 820 (2002) ("There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question."); *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed. 2d 575 (1988).

A claim may be procedurally defaulted in at least two ways: first, when the claim is presented to the state courts in a way that does not comport with state procedural rules, and, second, when the claim has never been presented to the state courts and has become barred from being presented by state procedural rules. Again, the Eleventh Circuit has explained:

> Such procedural default can arise in two ways. First, where the state court correctly applies a procedural default principle of state law to arrive at the conclusion that the petitioner's federal claims are barred, *Sykes* requires the federal court to respect the state court's decision. *Atkins v. Singletary*, 965 F.2d 952, 956 (11th Cir .1992), *cert. denied*, 515 U.S. 1165, 115 S.Ct. 2624, 132 L.Ed. 2d 865 (1995);

> *Meagher v. Dugger*, 861 F.2d 1242, 1245 (11th Cir. 1988). Second, if the petitioner simply never raised a claim in state court, and it is obvious that the unexhausted claim would now be procedurally barred due to a state-law procedural default, the federal court may foreclose the petitioner's filing in state court; the exhaustion requirement and procedural default principles combine to mandate dismissal. *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir.), *cert. denied*, 525 U.S. 963, 119 S.Ct. 405, 142 L.Ed. 2d 329 (1998); *see also* 28 U.S.C. § 2254(b)(1)(A)(1994) (pre-AEDPA) ("An application for writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State. . . .").

Bailey v. Nagle, 172 F.3d 1299, 1302–03 (11th Cir. 1999); *see Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001) ("If the petitioner has failed to exhaust state remedies that are no longer available, that failure is a procedural default which will bar federal habeas relief, unless either the cause and prejudice or the fundamental miscarriage of justice exception is established."). Consequently, the habeas court is required to determine not only how claims presented to the state court were treated by those courts, but also to tag those claims asserted in the habeas action that were never alleged during state proceedings.

If it is determined that a claim was procedurally defaulted in state court, the petitioner may obtain review of the claim in habeas corpus only by showing "cause and prejudice" to excuse the default, *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed. 2d 783 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed. 2d

594 (1977), or by showing that refusal to consider the claim will result in a "fundamental miscarriage of justice." *Smith v. Murray*, 477 U.S. 527, 537–38, 106 S.Ct. 2661, 91 L.Ed. 2d 434 (1986). The "cause and prejudice" test of *Engle v. Isaac* and *Wainwright v. Sykes* is in the conjunctive; therefore, petitioner must prove both cause and prejudice.

The United States Supreme Court summarized the "cause" prong of the standard in the following manner:

> In *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), this Court adopted the "cause and prejudice" requirement of *Francis v. Henderson*, *supra*, for all petitioners seeking federal habeas relief on constitutional claims defaulted in state court. The *Sykes* Court did not elaborate upon this requirement, but rather left open "for resolution in future decisions the precise definition of the 'cause' -and- 'prejudice' standard." 433 U.S., at 87, 97 S.Ct., at 2507. Although more recent decisions likewise have not attempted to establish conclusively the contours of the standard, they offer some helpful guidance on the question of cause. In *Reed v. Ross*, 468 U.S. 1, 104 S.Ct. 2901, 82 L.Ed. 2d 1 (1984), the Court explained that although a "tactical" or "intentional" decision to forego a procedural opportunity normally cannot constitute cause, *id.*, at 13–14, 104 S.Ct., at 2909, "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which the [cause] requirement is met." *Id.*, at 14, 104 S.Ct., at 2909. The Court later elaborated upon *Ross* and stated that "the existence of cause for a procedural default must ordinarily turn on

> whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488, 106 S.Ct. 2639, 2645, 91 L.Ed. 2d 397 (1986). We explained that "a showing that the factual or legal basis for a claim was not reasonably available to counsel, . . . would constitute cause under this standard." *Ibid.* (Citations omitted.)

Amadeo v. Zant, 486 U.S. 214, 221–22, 108 S.Ct. 1771, 100 L.Ed. 2d 249 (1988).

The petitioner also must demonstrate that he was prejudiced; he must show "not merely that the errors . . . created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed. 2d 816 (1982) (emphasis in original).

A federal habeas court will consider a procedurally defaulted claim on one additional basis in the absence of a showing of "cause and prejudice": if a "fundamental miscarriage of justice" has "probably resulted in the conviction of one who is actually innocent." *Smith v. Murray*, 477 U.S. 527, 537–38, 106 S.Ct. 2661, 91 L.Ed. 2d 434 (1986) (quoting, respectively, *Engle*, 456 U.S. at 135, and *Murray*, 477 U.S. at 496). This exception requires a showing of innocence of the fact of the crime, not merely "legal" innocence. The burden rests on the petitioner to come forward with evidence tending to establish a colorable claim of *actual* innocence. *Isaacs v. Head*, 300 F.3d 1232, 1255 (11th Cir. 2002) ("In order to show the type of 'miscarriage of justice' that will excuse a procedural bar, a petitioner must make 'a colorable showing of actual innocence.' " (quoting *Bailey v.*

Nagle, 172 F.3d 1299, 1306 (11th Cir. 1999))); *see also Crawford v. Head*, 311 F.3d 1288 (11th Cir. 2002); *see generally Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853, 122 L.Ed. 2d 203 (1993); *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed. 2d 364 (1986).

I. Habeas Claim D (Failure to Hold Competency Hearing)—At paragraphs 100 through 106 of the habeas petition, petitioner contends that the trial court erred by failing to hold a hearing on his competency to stand trial under *Alabama Code* § 15–16–21 (1975) and by accepting a competency report from a Dr. Seger, whom petitioner contends has used "bogus credentials." First, it is not at all clear that this claim asserts a violation of the petitioner's *federa*l constitutional rights. Habeas relief lies only to correct errors substantially affecting *federal* rights. To the extent petitioner contends only that an error of state law occurred, habeas relief is not available to correct it. *Dugger v. Adams*, 489 U.S. 401, 409–10, 109 S.Ct. 1211, 103 L.Ed. 2d 435 (1989) ("It is clear that 'mere errors of state law are not the concern of this Court unless they rise for some other reason to the level of a denial of rights protected by the United States Constitution.' "(quoting *Barclay v. Florida*, 463 U.S. 939, 957–958, 103 S.Ct. 3418, 3428–3429, 77 L.Ed. 2d 1134 (1983))).

Assuming, however, that this claim alleges a violation of federal law regarding the right to a hearing on the petitioner's competency to stand trial, *see Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed. 2d 815 (1966); *James v. Singletary*, 957 F.2d 1562 (11th Cir. 1992), it was never raised at trial or on direct appeal from conviction. Although petitioner asserted this claim in his Rule 32 petition (*see* Tab–40, p. 25), the Alabama Court of Criminal Appeals found it to be procedurally defaulted because it was not raised at trial or on direct

appeal. *Jones v. State*, 753, So. 2d 1174, 1205 (Ala. Crim. App.), *cert. denied*, (Ala. 1999). Without a showing of "cause and prejudice" to excuse the default, this court cannot grant habeas relief on the claim.

Petitioner has not shown cause and prejudice to excuse the default, even though he argues that he received ineffective assistance of trial and appellate counsel for the very reason that they failed to raise this claim. (*See* Petition, ¶ 106). Although ineffective assistance of counsel can constitute adequate "cause" under the cause and prejudice standard, it must be pled and proven as an independent ground for habeas relief. The Supreme Court recently reiterated that ineffective assistance as cause under the cause and prejudice standard must itself rise to the level of a constitutional violation. In *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed. 2d 518 (2000), the Court wrote:

> Not just any deficiency in counsel's performance will do, however; the assistance must have been so ineffective as to violate the Federal Constitution. *Ibid.* In other words, ineffective assistance adequate to establish cause for the procedural default of some *other* constitutional claim is *itself* an independent constitutional claim.

Id. at 451; *see Murray v. Carrier*, 477 U.S. 478, 106 S.Ct. 2639, 91 L.Ed. 2d 397 (1986); *Eagle v. Linahan*, 279 F.3d 926, 937 (11th Cir. 2001) ("[A]ttorney error is cause for procedural default only if the error rises to the level of constitutionally deficient assistance of counsel under the Sixth Amendment."). Further, the claim of

ineffectiveness-as-cause[21] must be both exhausted and not procedurally defaulted in state court. *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed. 2d 518 (2000); *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996). Petitioner has not alleged as an independent claim for relief in this action that he received ineffective assistance due to counsel's failure to assert this argument at trial and on direct appeal. Although petitioner asserted the claim of ineffective assistance of appellate counsel, setting out three particular claims he argues counsel should have pursued on appeal, the claim that the court failed to conduct a competency hearing was not one of them. Nor was such a claim of ineffectiveness asserted and exhausted as a free-standing ground for Rule 32 relief. By failing to so assert it in the Rule 32 petition, it was not exhausted and is now defaulted under the time bar provision of Rule 32.2(c). Consequently, this particular claim of ineffective assistance also has been procedurally defaulted and cannot now serve as cause in this action. *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed. 2d 518 (2000); *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996).

Although it may be argued that petitioner was unaware of Dr. Seger's allegedly "bogus credentials," that alone would not excuse his failure to raise the issue on direct appeal or during the Rule 32 proceedings. The constitutional right at stake was the right to a *Pate* hearing, the purpose of which would have been to put before the trial court all evidence relevant to petitioner's competency to

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[21] The Term "ineffectiveness-as-cause" is used here to describe a claim of ineffective assistance of counsel pled for the purpose of establishing "cause" to excuse a procedural default under the "cause and prejudice" standard of *Engle v. Isaac*, 456 U.S. 107, 102 S. Ct. 1558, 71 L.Ed. 2d 783 (1982), and *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed. 2d 594 (1977).

stand trial, including that tending to undermine the credibility of experts offering an opinion on the subject. Thus, petitioner was fully aware of the right at stake and its alleged violation as early as the time of trial, yet the failure of the trial court to hold a *Pate* hearing was never raised at trial or on direct appeal. Whether or not counsel's failure to raise the claim at trial and on direct appeal constituted ineffective assistance, such a claim of ineffectiveness has not been presented to the state courts. Because it is now defaulted also, it cannot serve as "cause" to rescue this substantive claim from the procedural default doctrine. This claim, therefore, is procedurally defaulted and cannot support habeas relief.

II. Habeas Claim E (Insufficient Evidence of Intent to Kill)—Petitioner's Claim E asserts that the evidence at trial was insufficient to establish his intent to kill anyone, a necessary element for a capital conviction supporting a death sentence. Although raised in the Rule 32 petition, the Alabama Court of Criminal Appeals found it to be defaulted because it was not raised at trial or as error on direct appeal. *Jones v. State*, 753, So. 2d 1174, 1205 (Ala. Crim. App.), *cert. denied*, (Ala. 1999). Again, petitioner contends that the "cause" excusing his default lies in the alleged ineffective assistance of his trial and appellate counsel, but again he did not allege this form of ineffective assistance of counsel as a basis for relief either in this habeas petition or the Rule 32 petition. Although he did allege as a ground for relief in the Rule 32 petition that the evidence of a specific intent to kill was insufficient, he did not allege that trial and appellate counsel were ineffective because they failed to raise the issue at trial and on appeal. Alleging one does not plead the other because a claim of ineffective assistance is distinct from a claim alleging the underlying error. *Bailey v. Nagle*, 172 F.3d 1299, 1304 n.8 (11th Cir.

1999) ("An ineffective-assistance claim is analytically distinct from the substantive claim underlying it.").

Petitioner did claim that his attorneys were ineffective because they failed to investigate and prove that petitioner did not kill the victims. This claim is premised on the theory that, although petitioner was present at the killings by his co-defendant and even stabbed the victims, they were already dead when he did so. It is not at all clear, however, that this version of alleged ineffectiveness is the same as alleging that counsel failed to argue there was insufficient evidence of specific intent to kill. Petitioner repeatedly emphasizes that, at the time of the killings, he was intoxicated and under the influence of narcotics to such an extent that he was incapable of forming an intent to kill. This argument is different from the assertion that the victims were killed by petitioner's co-defendant. The claim of insufficient evidence of intent to kill, while closely related to the claim that the victims were killed by another, focuses not on whether the victims were alive or dead when he stabbed them, but on petitioner's own state of mind—that is, whether he was capable of and did form the specific intent to kill. Thus, alleging that counsel were ineffective for failing to argue that the victims were dead when stabbed is not the same as alleging ineffective assistance due to counsel's failure to raise the lack of evidence of petitioner's ability to form the intent to kill. Because the petitioner alleged the former, which would not preserve the "ineffectiveness-as-cause" for the claim that the evidence of intent to kill was lacking, there is no "cause" under the "cause and prejudice" standard excusing the default of the insufficiency claim.

Assuming, alternatively, that petitioner adequately pled "ineffectiveness-as-cause" to excuse the default of the claim that the evidence of a specific intent to kill

was lacking, the Alabama Court of Criminal Appeals addressed the question of petitioner's intent in its discussion of the claim that counsel were ineffective in choosing not to assert the defense that petitioner was not involved in the actual killing of the victims. Rejecting the notion that petitioner was not actively involved, the Court of Criminal Appeals said, "Nor can we give any credence to the belief that the appellant was a mere bystander or accomplice in the massacre of the victims, and that his involvement was relatively minor." The court found the evidence of his participation in the killings more than adequate, and that counsel were not ineffective in investigating and then foregoing the defense that petitioner lacked the intent to kill. That conclusion is entitled to deference under § 2254(d) of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). The finding that there was sufficient evidence of an intent to kill by petitioner is not contrary to or an unreasonable application of Supreme Court precedent. The claim for relief on this ground must be denied.

III. Habeas Claim F (Pattern of Racial Bias)—Fairly read, petitioner appears to be asserting in this claim one similar to that in *McClesky v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed. 2d 262 (1987), that the death penalty imposed in his case was the product of racial bias. He alleges in conclusory terms that the victims were white, that he is black, and that he was tried and convicted in a predominantly white community. From this, he concludes that his conviction and death sentence are racially tainted.

Petitioner raised this claim for the first time in his Rule 32 petition, alleging that the death penalty in Alabama is arbitrarily and capriciously applied on the basis of race, in violation of the Eighth and Fourteenth Amendments. The Alabama Court of Criminal Appeals

found that this claim was procedurally defaulted because it was not raised at trial or on direct appeal. *Jones v. State*, 753 So. 2d 1174, 1205 (Ala. Crim. App.), *cert. denied*, (Ala. 1999). It certainly would be the type of claim that could and should be raised by way of a motion for new trial and dealt with on direct appeal. Thus, the claim is procedurally defaulted from review in this court, unless petitioner can show cause and prejudice to excuse the default.

Petitioner argues, as he did on the earlier claims for relief, that his trial and appellate lawyers rendered ineffective assistance, and such is the "cause" for default of this claim at trial and on direct appeal. To establish ineffectiveness-as-cause, petitioner must show that he has exhausted this claim of ineffective assistance and that it is a meritorious claim, warranting relief. *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed. 2d 518 (2000); *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996) It does not appear, however, that petitioner asserted this specific claim of ineffective assistance during his Rule 32 proceedings, leaving it unexhausted and procedurally defaulted. Although petitioner asserted multiple claims of ineffective assistance, the one closest to this claim is the allegation that his attorneys were ineffective because they failed to investigate the racial composition of Blount County. This fails to bring to the attention of the state courts adequately the potential allegation that counsel were ineffective because they failed to challenge the conviction and sentence on the specific ground that it was the product of a pattern of racial bias. Thus, the Rule 32 proceedings did not consider whether counsel were ineffective because they failed to raise a *McClesky* challenge; consequently, ineffective-assistance cannot be shown as "cause" to excuse the default of the racial-bias claim.

Even if the court could conclude that this particular form of ineffective assistance was presented to the Rule 32 court by petitioner's allegation that counsel should have investigated the racial composition of Blount County, the Alabama Court of Criminal appeals considered this claim on the merits and rejected it in the Rule 32 proceedings. *Jones v. State*, 753 So. 2d 1174, 1198–99 (Ala. Crim. App.), *cert. denied*, (Ala. 1999). Under § 2254(d), this finding is entitled to a presumption of correctness because it is neither contrary to nor an unreasonable application of Supreme Court precedent. *Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000). Because counsel were not ineffective in this regard, there is no ineffectiveness-as-cause to excuse the procedural default of petitioner's *McClesky* claim.

Finally, and perhaps more fundamentally, the petitioner has failed to present any evidence adequately establishing either a pattern of racial bias or that it actually tainted the verdicts in his case. As the Supreme Court said in *McClesky*:

> Our analysis begins with the basic principle that a defendant who alleges an equal protection violation has the burden of proving "the existence of purposeful discrimination." *Whitus v. Georgia*, 385 U.S. 545, 550, 87 S.Ct. 643, 646, 17 L.Ed. 2d 599 (1967). [Footnote omitted] A corollary to this principle is that a criminal defendant must prove that the purposeful discrimination "had a discriminatory effect" on him. *Wayte v. United States*, 470 U.S. 598, 608, 105 S.Ct. 1524, 1531, 84 L.Ed. 2d 547 (1985). Thus, to prevail under the Equal Protection Clause, McCleskey must prove that the deci-

> sionmakers in his case acted with discriminatory purpose. [Italic in original].

McCleskey v. Kemp, 481 U.S. 279, 292, 107 S.Ct. 1756, 1767, 95 L.Ed. 2d 262, 294 (1987). That evidence of a direct impact on *his* case is lacking. This claim is due to be denied.

IV. Habeas Claim G (Proportionality Review on Appeal)—At paragraphs 115 through 119 of the Petition, petitioner alleges that the practice of Alabama appellate courts of limiting death-penalty proportionality review to other death-sentenced cases only (as distinct from also considering similar cases in which death was not imposed), fails to assure an evenhanded and non-arbitrary application of the death penalty because it fails to take into account similar cases in which the death penalty was *not* imposed. The Alabama Court of Criminal Appeals found in the Rule 32 proceedings that this claim was procedurally defaulted because it was not raised at trial or on direct appeal. *Jones v. State*, 753 So. 2d 1174, 1205 (Ala. Crim. App.), *cert. denied*, (Ala. 1999).[22]

Petitioner argues, as he did on earlier claims for relief, that his trial and appellate lawyers rendered ineffective assistance, and such is the "cause" for default of this claim at trial and on direct appeal. To establish ineffectiveness-as-cause, petitioner must show that he has exhausted this claim of ineffective assistance and that it

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[22] As with an earlier claim, it seems odd to find a claim procedurally defaulted because it was not raised on direct appeal when the essence of the claim is a challenge to what happened on appeal, viz., the failure of the appellate court to perform an adequate proportionality review. It would seem more reasonable to present a proportionality challenge in a post-conviction petition, such as a Rule 32 petition. Only after the appeal is complete can the fact of the inadequate proportionality review be known. For this reason, the court doubts that the claim actually is procedurally defaulted.

is a meritorious claim, warranting relief. *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed. 2d 518 (2000); *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996). It does not appear, however, that petitioner asserted this specific claim of ineffective assistance during his Rule 32 proceedings, leaving it unexhausted and procedurally defaulted. A claim of ineffective assistance by appellate counsel that was pled in the Rule 32 petition alleged that counsel failed to object to the absence of meaningful appellate review of death sentences. While this claim vaguely upbraids counsel for failing to challenge inadequacies in the appellate-review process, it does not specifically raise the point that counsel missed the issue of the courts' proportionality review being insufficient because it fails to take into account non-death sentenced cases. Thus, this claim failed to adequately apprize the state courts of the nature of the error allegedly made by appellate counsel and failed to exhaust the ineffectiveness-as-cause argument that counsel failed to challenge the sufficiency of the proportionality review.

Moreover, petitioner apparently abandoned this claim of ineffectiveness-as-cause on appeal from denial of the Rule 32 petition. Although the claim of ineffective assistance of appellate counsel was pled in the petition, petitioner's brief on appeal of the Rule 32 proceedings makes no mention of the assertion that counsel was ineffective because he failed to challenge the absence of meaningful appellate review of death sentences. (*See* Brief of Appellant, Tab R-42). Not surprising, [sic] the opinion of the Alabama Court of Criminal Appeals disposing of the Rule 32 appeal also makes no mention of this particular ineffectiveness claim. Thus, even if raised at the Rule 32 pleading stage, it was not exhausted by presentation on appeal, resulting in its procedural default. *Esslinger v. Davis*, 44 F.3d 1515 (11th Cir.

1995) (failure to appeal a claim denied in a post-conviction petition is a procedural default of the claim). Being itself procedurally defaulted, it cannot establish "cause" to excuse the procedural default of the underlying substantive claim. *Edwards v. Carpenter*, 529 U.S. 446, 120 S.Ct. 1587, 146 L.Ed. 2d 518 (2000); *Hill v. Jones*, 81 F.3d 1015 (11th Cir. 1996).

As mentioned in this court's footnote 22, however, the court doubts that the procedural default identified by the Alabama Court of Criminal Appeals is an "adequate" ground for denying relief. *See Lee v. Kemna*, 534 U.S. 362, 376, 122 S.Ct. 877, 151 L.Ed. 2d 820 (2002) ("There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question."). Turning to the merits of the claim, it is clear that the Supreme Court has never mandated proportionality review as an indispensable part of a constitutionally sound capital sentencing scheme. In *Pulley v. Harris*, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed. 2d 29 (1984), the Court squarely rejected the notion that proportionality review is constitutionally necessary in capital sentencing schemes using other means to assure that the sentence is not arbitrarily applied.

> That *Gregg* and *Proffitt* did not establish a constitutional requirement of proportionality review is made clearer by *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed. 2d 929 (1976), decided the same day. In *Jurek* we upheld a death sentence even though neither the statute, as in Georgia, nor state case-law, as in Florida, provided for comparative proportionality review.

Pulley v. Harris, 465 U.S. 37, 48, 104 S.Ct. 871, 878, 79 L.Ed. 2d 29 (1984). As long as the sentencing scheme

provides for assurances of rationality and guidance for the sentencing authority, proportionality review is not necessary. For example, some means by which arbitrariness can be checked include limiting the number and types of offenses subject to the death sentence, bifurcating proceedings, requiring a finding of aggravating circumstances, and consideration of mitigating circumstances. All of these features are present in the Alabama capital sentencing scheme, thus eliminating the constitutional need[23] for proportionality review under *Pulley*. *See also Lindsey v. Smith*, 820 F.2d 1137 (11th Cir. 1987). Regardless of the adequacy of the proportionality review conducted by the state courts, habeas relief is not warranted because proportionality review is not required by federal law. There not being a violation of federal constitutional law, Habeas Claim G is due to be denied.

V. Habeas Claim H (Electrocution is Cruel and Unusual Punishment)—Petitioner alleges at paragraphs 120 through 124 that electrocution as a means of carrying out the death sentence constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. At the outset, it appears that this claim is now moot, given that Alabama changed its method of execution to lethal injection in 2002. *Alabama Code* § 15–18–82 (2002)[24]. To the extent it is not moot, it is

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[23] Insofar as petitioner alleges that the state courts failed to conduct an adequate proportionality review under state law, the claim fails to state a violation of a federal right; federal habeas corpus is not available to correct a violation of state law. *Pulley v. Harris*, 465 U.S. 37, 104 S. Ct. 871, 79 L.Ed. 2d 29(1984).

[24] Ala. Code § 15–18–82 was amended, effective July 1, 2002, to make lethal injection the default method of execution in Alabama. *See* Ala. Act 2002–492, § 2.

procedurally defaulted because it was not raised at trial or on direct appeal. *Jones v. State*, 753 So. 2d 1174, 1205–6 (Ala. Crim. App.), *cert. denied*, (Ala. 1999). Further, petitioner's contention that the ineffectiveness of his attorneys constitute "cause" to excuse the default fails because the Alabama Court of Criminal Appeals specifically considered it and found counsel not ineffective for failing to raise a challenge to the manner of execution. That finding is not contrary to or an unreasonable application of federal law as found by the Supreme Court and, therefore, is entitled to deference. 28 U.S.C. § 2254(d); *Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed. 2d 389 (2000). Lacking "cause" to excuse the default, the claim must be denied.

VI. Habeas Claim I (Violation of Right to Impartial Jury)—Petitioner alleges at paragraphs 125 through 127 of the petition that he was deprived of a fair and impartial jury because a particular juror, Juror Moss, failed to disclose during *voir dire* that he knew the sheriff and deputies involved in the investigation, and that he was acquainted with the victims and was familiar with their house from having visited it. This claim was raised as Claim R in the petitioner's Rule 32 petition, and an evidentiary hearing on the claim was conducted by the trial court. The Alabama Court of Criminal Appeals addressed this issue, stating the facts and law as follows:

> To determine whether a defendant was prejudiced by a juror's failure to respond truthfully to a question during voir dire examination, the test is whether the defendant actually was prejudiced. *Knight v. State*, 710 So. 2d 511 (Ala. Cr. App. 1997). See *Dawson v. State*, 710 So. 2d 472 (Ala. 1997). To assist in the determina-

tion of prejudice, the following factors have been considered pertinent:

> "[the] temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about."

Tomlin, 695 So. 2d at 170, quoting *Johnson v. State*, 536 So. 2d 957, 958 (Ala.Cr.App.1987), *cert. denied*, 490 U.S. 1046, 109 S.Ct. 1955, 104 L.Ed. 2d 424 (1989). " 'Thus, the facts in each case must be considered individually and much will remain in the discretion of the trial judge.' " *Tomlin,* 695 So. 2d at 170, quoting *Parish v. State*, 480 So. 2d 29, 30 (Ala. Cr. App. 1985).

In light of the foregoing caselaw, we will now address Jones's[sic] allegations of juror misconduct separately.

1. Juror J.M.'s association with various witnesses.

Jones's[sic] counsel asked the following question during voir dire examination of the jury venire:

> "Do any of you know [Sheriff] J.C. Carr? Everyone in the county knows J.C. Carr—72% of you voted for him and kept him in office for six terms. My question would be with respect if you know him on a personal basis—member of the same church, or

> social organizations that you felt it would affect the way you receive the testimony from J.C. or some of his deputies? Mr. Tom Ed Dick[ey], do any of you know him? Mr. Billy [Erbin]? Mr. Fred [Alcorn]? Do any of you know J.C. on a personal basis?"

(C.R. 340.) [Juror Moss] did not respond to this question and was selected as a member of the jury. Just prior to his Rule 32 hearing, Jones learned that [Juror Moss] knew the sheriff and several of his deputies.

During the hearing, [Juror Moss] testified as follows concerning any effect his acquaintanceship with the sheriff and his deputies had upon his role as a juror:

> "[Jones's [sic] counsel]: In fact, you knew just about everybody around, didn't you?
>
> "[Juror J.M.]: Well, yeah.
>
> "[Jones's counsel]: You knew Judge NeSmith who was the judge at the time of the trial."
>
> "[Juror J.M.]: Yeah, uh-huh.
>
> ". . . .
>
> "[Jones's counsel]: And you knew officer Tom Ed Dickey?
>
> "[Juror J.M.]: Yes.
>
> "[Jones's counsel]: And you knew officer Fred Alcorn?
>
> "[Juror J.M.]: Yeah.

"[Jones's counsel]: And you knew officer Billy Erbin?

"[Juror J.M.]: Yeah.

"[Jones's counsel]: And you knew the sheriff, J.C. Carr?

"[Juror J.M.]: Yeah, right.

"[Jones's counsel]: Do you recall whether you informed the court whether you knew these people?

"[Juror J.M.]: I don't recall. I don't believe I was asked.

"[Jones's counsel]: Were you questioned by any of the attorneys for the defendant as to whether or not you knew any of those people?

"[Juror J.M.]: Yeah, I think so. I don' – you know, that has been a long time ago.

"[Jones's counsel]: Sure, I understand. But do you recall whether in court in front of the Judge?—

"[Juror J.M.]: I believe Judge NeSmith, yeah.

"[Jones's counsel]: Okay. Did you know Officer Tom Ed Dickey well enough to form an opinion as to whether or not you found him to be an honest and truthful person?

"[Juror J.M.]: Yeah.

"[Jones's counsel]: And was the same true of Fred Alcorn?

"[Juror J.M.]: Yeah.

"[Jones's counsel]: And Billy Erbin?

"[Juror J.M.]: Yeah.

"[Jones's counsel]: And Sheriff Carr?

"[Juror J.M.]: Yeah.

". . . .

"[Prosecutor]: [J.M.], the fact that you knew Judge NeSmith, Mr. Dickey, Mr. Alcorn, Mr. Erbin . . . , did that effect [sic] your verdict?

"[Juror J.M.]: No, un-un.

"[Prosecutor]: Do you recall being asked that in court by a lawyer?

"[Juror J.M.]: I don't recall it, no. It could have happened but I don't recall it being asked.

"[Prosecutor]: So, do you recall the instructions of the court that you were supposed to make your decision on the verdict and on the sentence based upon what came from that bench right there and instructions from the Judge?

"[Juror J.M.]: Right, uh-huh.

"[Prosecutor]: And even though you knew these people and you testified that they were truthful people, were you able to put that out of your mind to come to a [sic] deliberations?

"[Juror J.M.]: Render a verdict, yeah.

"[Prosecutor]: Did you in fact render your decision based upon only what came from the witness stand?

"[Juror J.M.]: What we heard, yeah.

"[Prosecutor]: And the instructions from the Judge?

"[Juror J.M.]: Yeah."

(R. 262–66, 273–74.)

We are unwilling to say that [Juror Moss] failed to respond truthfully to the question posed by Jones's counsel during voir dire examination. It is significant that Juror [Moss] actively engaged in voir dire and when asked admitted that he knew the victims. As asked, the question left room for subjective interpretations by the veniremembers. Therefore, we do not find that Juror [Moss's] failure to respond to this question constitutes juror misconduct.

Moreover, Juror [Moss] testified at the Rule 32 hearing that even though he knew these witnesses and perhaps had formed an opinion that they were truthful, he based his verdict on the testimony presented and on the trial court's instructions. Because no evidence was presented that Juror [Moss's] acquaintanceship with the sheriff and his deputies actually prejudiced Jones, we find no basis for reversal on this claim. . . .

2. Juror J.M.'s association with the victims and his knowledge of the "layout" of the victims' house.

The trial court asked the following question during voir dire examination of the jury venire:

> "Do any of you ladies and gentlemen of this jury venire know anything about the facts of this case which would influence your verdict one way or the other?"

(R. 8.) Although [Juror Moss] admitted that he knew the victims, he did not reveal that he had frequented the victims' house. Just before his Rule 32 hearing, Jones learned that [Juror Moss] had made service calls to the victims's [sic] house.

During the hearing, Juror [Moss] testified as follows concerning his acquaintanceship with the victims and his knowledge of the layout of their house:

> "[Jones's counsel]: Prior to the beginning of the trial in 1982 did you know Carl Willie Nelson?
>
> "[Juror J.M.]: Yeah.
>
> "[Jones's counsel]: And did you know him quite well?
>
> "[Juror J.M.]: Yeah, I had done work for them.
>
> "[Jones's counsel]: You did work at their house on more than one occasion?
>
> "[Juror J.M.]: Yeah, uh-huh.
>
> "[Jones's counsel]: And of course during that work you became quite familiar with the interior of that house; is that correct?

"[Juror J.M.]: Yeah, some parts of it.

"[Jones's counsel]: Which parts?

"[Juror J.M.]: The kitchen, back porch, well pump, washing machine.

" [Jones's counsel] : And you knew the layout of the house, how the rooms were arranged, that sort of thing?

"[Juror J.M.]: Just the back porch and kitchen.

"[Jones's counsel]: At the time of the trial did you consider the Nelsons to be clients or customers of yours?

"[Juror J.M.]: Well at the time I knew them I was working with a local gas company down here doing their service work.

"[Jones's counsel]: How many times prior to your service on the jury had you been in the Nelson home?

"[Juror J.M.]: Oh, two or three times.

"[Jones's counsel]: And you understood that that was the same location that the events in question in the trial occurred?

"[Juror J.M.]: Yeah. Yeah.

"[Jones's counsel]: Now, when you were following the evidence and the testimony of the trial, you had a picture in your head of that scene, that house where the events occurred; is that right?

"[Juror J.M.]: Well I knew where the location was.

"[Jones's counsel]: And you were familiar with the house, you could recall what it looked like?

"[Juror J.M.]: Just the kitchen and the back porch."

(R. 266–68.)

We are unwilling to say that [Juror Moss] responded untruthfully to the question posed by the trial court during voir dire examination and that his failure to respond constituted juror misconduct. The question, "Do any know anything about the *facts* of this case which would influence your verdict one way or the other?" left room for subjective interpretations. From the testimony presented at the Rule 32 hearing, Juror [Moss] had limited knowledge of the victims' house. We do not find the fact that Juror [Moss] had made two or three service calls and knew the kitchen and back porch of the victims' house, in light of the fact that the murders occurred in another location in the house, to constitute "facts of this case." Moreover, Jones had been informed that [Juror Moss] knew the victims and counsel could have explored during voir dire examination the basis of that knowledge. Finally, Jones has failed to establish that [Juror Moss's] failure to indicate that he had frequented the victims' house on two or three occasions before the murders prejudiced him. Therefore, we find no basis for a finding that J.M.'s actions were prejudicial. See also *Brownlee v. State,* 545 So. 2d 151 (Ala. Cr. App. 1988), aff'd, 545 So. 2d 166 (Ala.), cert. denied, 493 U.S. 874, 110 S.Ct. 208, 107 L.Ed.

> 2d 161 (1989) (the mere fact that a juror is personally acquainted with the victim does not automatically disqualify him from sitting on the criminal jury).
>
> Finally, we find nothing to indicate that Jones's trial counsel would have struck [Juror Moss] had he known the information [Juror Moss] revealed at the evidentiary hearing. Consequently, Jones has not satisfied his burden of pleading and proving this claim. See Rule 32.3 and 32.6(b), Ala.R.Crim.P.

Jones v. State, 753 So. 2d 1174, 1200–1203 (Ala. Crim. App.), *cert. denied*, (Ala. 1999).

The court cannot say that these conclusions are contrary to or an unreasonable application of Supreme Court precedent, and, thus, they are entitled to deference. In essence, reviewing the evidence presented at the Rule 32 hearing, the Court of Criminal Appeals found that petitioner had not proven that he suffered actual prejudice from Juror Moss's failure to reveal his acquaintance with the Sheriff, his deputies, the victims[25], or the victims' home. The right to a hearing to attempt to prove actual prejudice is the remedy provided by constitutional law, which he received in the Rule 32 proceedings. That he was unable to prove actual prejudice precludes relief.

In *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940, 71 L.Ed. 2d 78 (1982), the United States Supreme Court discussed the constitutional right to an impartial jury and

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[25] In fact, the trial record reveals that Juror Moss responded by raising his hand when asked whether any veniremen knew the victims. *See* Trial Record at page 38. Thus, his acquaintance with the victims was made known during *voir dire*. The allegation that Juror Moss failed to disclose that he knew the victims is contradicted by the record and is meritless.

the remedy for an alleged violation of the right. The Court stated that it "has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215. Due process does not require that every instance of potential bias by a juror result in the setting aside of the jury's decision. Rather, the defendant must be given an opportunity to prove that the possible bias caused him "actual prejudice." In refusing to apply a standard to proceedings in state court different from that in federal court, the Court explained:

> Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing like that ordered in *Remmer [v. United States*, 347 U.S. 227, 74 S.Ct. 450, 98 L.Ed. 654 (1954)], and held in this case.

Id. at 217. The right to be tried by an impartial jury carries no implied prejudice; rather, actual prejudice must be proven at a hearing for that purpose. The burden of proving prejudice falls to the petitioner. *See, e.g. Williams v. Taylor*, 529 U.S. 420, 442, 120 S.Ct. 1479, 146 L.Ed. 2d 435 (2000) (held: petitioner was entitled to an evidentiary hearing because "[i]t may be that petitioner could establish that [a particular juror] was not impartial").

Here, petitioner was afforded an evidentiary hearing at which he had the opportunity to attempt to prove actual prejudice from Juror Moss's failure to disclose his familiarity with the investigators and the victims' residence. The conclusion by the state court is not factually unrea-

sonable nor contrary to or an unreasonable application of Supreme Court precedent. Factually, the trial record reveals that petitioner was not surprised by the fact that Juror Moss knew the sheriff or the victims. Moss indicated that he knew the victims, and everyone acknowledged that the sheriff was well-known by many people in Blount County. Moss's testimony negates any implication that his acquaintance with the sheriff (or, by extension, the sheriff's deputies) and the victims caused him to consider the case any differently than if he had not known them. The juror's testimony that he was not prejudiced by his knowledge of the people involved was competent evidence of the lack of bias. In rejecting the argument that the "self-justification" of a juror testifying that he was not biased is inherently suspect, the Supreme Court said:

> As we said in *Dennis v. United States*, 339 U.S. 162, 70 S.Ct. 519, 94 L.Ed. 734 (1950), "[o]ne may not know or altogether understand the imponderables which cause one to think what he thinks, but surely one who is trying as an honest man to live up to the sanctity of his oath is well qualified to say whether he has an unbiased mind in a certain matter." *Id.*, at 171, 70 S.Ct., at 523. *See also United States v. Reid*, 12 How. 361, 366, 13 L.Ed. 1023 (1852).

Smith v. Phillips, 455 U.S. 209, 217 n.7, 102 S.Ct. 940, 71 L.Ed. 2d 78 (1982).

Thus, given Juror Moss's Rule 32 testimony and the absence of any other evidence establishing actual bias by him, his mere failure to reveal his acquaintance with the

sheriff and the sheriff's deputies[26] fails to establish a violation either of petitioner's Sixth Amendment right to an impartial jury or his Fourteenth Amendment right to due process. Likewise, given that Juror Moss *did* disclose his familiarity with the victims, his failure to disclose that he had been in parts of the victims' home was not prejudicial. An astute lawyer would assume that, if he knew the victims, he might also be familiar with their house, and counsel could go into further *voir dire* examination on that point, if necessary. Additionally, nothing about the layout or condition of the house itself seems to have had any significance in the evidence about the crime; there was no critical debate at trial concerning the location of the crime. This is all to say that the determination by the Alabama Court of Criminal Appeals that Juror Moss's failure to reveal this information caused no actual prejudice is factually correct and reasonable. As such, it is entitled to deference under 28 U.S.C. § 2254(d), and habeas relief is not warranted on this claim.

VII. Habeas Claim J (Juror Misconduct During Deliberations)—At paragraphs 128 and 129 of the petition, petitioner avers that he was deprived of a fair trial because Juror Moss injected improper information into

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[26] It is worth noting that one issue concerning the testimony of the deputies relates to their credibility regarding the circumstances of petitioner's confession. The deputies testified that no promise of benefit or coercion was used to obtain the statement. Petitioner testified that he gave the statement because the deputies told him it would help him get bond. Nevertheless, the assessment of their credibility on this point was for the trial judge, during the hearing to suppress the statement, not the jury. Thus, Juror Moss's failure to disclose his acquaintance with the deputies did not result in actual prejudice in this regard because Moss was not called on to assess the credibility of the testimony of deputies surrounding the taking of the statement.

the deliberations of the case. He alleges that during deliberations at the sentencing phase[27], Moss told the other jurors, incorrectly and perhaps improperly, that petitioner would be paroled after a few years in prison unless the death penalty were imposed. This claim was raised in his Rule 32 petition and was one of the subjects of testimony at the hearing. The trial court rejected relief and on appeal, the Alabama Court of Criminal Appeals also concluded that it did not warrant a new trial or sentencing proceeding. The Court of Criminal Appeals wrote:

> Additionally, we reject Jones's[sic] claim that his "death sentence was the result of coercive influences brought into the jury deliberations which were outside the scope of the evidence and judicial control." (Appellant's brief at p. 97.) Specifically, he argues that a juror's statement that "if we give him life that maybe in a few years that he would be up for parole" improperly persuaded others to sentence him to death. (R. 275–76.)
>
> Testimony at the Rule 32 hearing indicated that before reaching its 12–0 advisory verdict recommending a sentence of death, the jury voted several times. Several ballots resulted in a 10–2 determination to recommend death. One of the two individuals who initially voted against death testified that she changed her vote in favor of death after [Juror Moss] made the statement regarding parole.

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[27] Because the allegedly improper comment was made during deliberations at the sentencing phase, not the guilt/innocence phase, it is clear that the conviction is not implicated in this claim, only the death sentence recommended by the jury.

"A juror cannot impeach his verdict by later explaining why or how the juror arrived at his or her decision." *Adair v. State,* 641 So. 2d 309, 313 (Ala. Cr. App. 1993).

Moreover, Rule 606(b), Ala.R.Evid., provides, in pertinent part:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon that or any other juror's mind or emotions as influencing the juror as to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes." [Footnote omitted].

We find no merit to Jones's [sic] claim because it was based on prohibited testimony. A consideration of the claim would destroy the integrity of the jury system, encourage the introduction of unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a

> verdict without fear of post-trial harassment, publicity, or scrutiny. See *Ex parte Neal*, 731 So. 2d 621 (Ala. 1999); and *Barbour v. State*, 673 So. 2d 461, 469–470 (Ala.Cr.App.1994), aff'd, 673 So. 2d 473 (Ala. 1995), cert. denied, 518 U.S. 1020, 116 S.Ct. 2556, 135 L.Ed. 2d 1074 (1996) .
>
> Furthermore, Jones has failed to show that he suffered any prejudice in this regard. '[T]he judge, and not the jury, is the final sentencing authority in criminal proceedings.' *Ex parte Hays*, 518 So. 2d 768, 774 (Ala. 1986)." *Ex parte Giles*, 632 So. 2d 577, 583 (Ala. 1993), cert. denied, 513 U.S. 1199, 115 S.Ct. 1271, 131 L.Ed. 2d 149 (1995). Here, the challenged verdict is advisory. A jury during the sentencing phase only needs 10 votes to render an advisory verdict of death. Before [Juror Moss's] alleged coercive statement the vote was 10–2 for a reccommendation of death; therefore, we find [Juror Moss's] alleged improper influence to be at most harmless error. Rule 45, Ala.R.App.P.

Jones v. State, 753 So. 2d 1174, 1203–1204 (Ala. Crim. App.), *cert. denied*, (Ala. 1999). This resolution of the claim is entitled to deference unless it is contrary to or an unreasonable application of Supreme Court precedent. *See* 28 U.S.C. § 2254(d).

The injection of improper evidence or information into the jury's deliberation requires a new trial only if it results in actual prejudice to the defendant; if the improper evidence or information was harmless beyond a doubt, the defendant has suffered no prejudice. *See Rushen v. Spain*, 464 U.S. 114, 121, 104 S.Ct. 453, 78

L.Ed. 2d 267 (1983) ("[T]he state courts had convincing evidence that the jury's deliberations, as a whole, were not biased by the undisclosed communication of juror Fagan's recollection. The lower federal courts should have deferred to this presumptively correct state court finding and therefore found the alleged constitutional error harmless beyond a reasonable doubt"). Thus, petitioner was required to show at the Rule 32 hearing that the comment by Juror Moss actually prejudiced the jury's deliberation of the sentence to be imposed.

The state appellate court's discussion of the rule of evidence prohibiting a juror from testifying about the process of deliberation is grounded on the idea that Juror Moss's comment was *not* "extraneous information" injected into the deliberations. His belief that petitioner would be released after only a few years in prison unless the death penalty was imposed was one of the false ideas brought to the discussions by the jurors themselves; even though factually wrong, it was part and parcel of the deliberative process itself, not something "extraneous" to the process. As such, the appellate court correctly concluded that the evidence offered on this point was nothing more than prohibited juror testimony about the deliberative process, that is, what discussions influenced and shaped the jury's decision. The conclusion that petitioner could not attack the verdict on the basis of that testimony was not contrary to or an unreasonable application of Supreme Court precedent.

Likewise, the conclusion that Juror Moss's comment, even if improper, was harmless error also is not contrary to or an unreasonable application of Supreme Court precedent. As the Alabama Court of Criminal Appeals noted, before Moss made the comment, the jury had voted 10 to 2 to recommend the death sentence, which was legally sufficient to support the recommendation.

Although the vote count became unanimous after it was made, Moss's comment did not cause the vote count to swing from a recommendation of a life sentence to one of death. Thus, whether or not Moss had ever made the comment, and regardless of its inaccuracy, the jury had already determined that it would recommend a sentence of death. Moreover, the court properly noted that the jury's recommendation was merely advisory and the judge was the one who ultimately decided to impose a sentence of death. It was thus harmless beyond a doubt, and the resolution of this claim by the state courts is entitled to deference.

CONCLUSION

Accordingly, for the reasons stated above, the court finds that the petition for writ of habeas corpus under 28 U.S.C. § 2254 is due to be denied and dismissed with prejudice. Likewise, the court finds that no evidentiary hearing is necessary for resolution of the claims in this court; petitioner's motion for a hearing will be denied. A separate order will be entered to that effect and denying the petition for relief.

The Clerk is DIRECTED to serve a copy of this memorandum opinion upon counsel for the petitioner and upon counsel for the respondents.

DATED this 6 day of February, 2004.

/s/ INGE P. JOHNSON
INGE P. JOHNSON
UNITED STATES DISTRICT JUDGE

IN THE CIRCUIT COURT FOR BLOUNT COUNTY, ALABAMA

Filed June 10, 1996
Case No. CC79 093 OH

AARON LEE JONES,

Petitioner

Versus

STATE OF ALABAMA,

Respondent

ORDER

This cause was submitted on the pleading of the parties, the testimony and the exhibits received in open court. Upon consideration thereof, the Court enters the following findings of fact and conclusions of law:

PROCEDURALLY BARRED CLAIMS

A. Claims Which Were Raised At Trial and On Direct Appeal Are Precluded From Review

The claim that petitioner's rights to a fair trial by an impartial jury were violated by the trial court's failure to grant a change of venue was raised at trial and on direct

appeal and, was addressed and rejected by the appellate courts. Therefore, this claim is precluded from review.

Claims which were raised at trial and on direct appeal are precluded from further review in Rule 32 proceedings. Rule 32.2(a)(2) and (a)(4), Alabama Rules of Criminal Procedure. *See, e.g., Cochran v. State,* 548 So.2d 1062, 1068 (Ala. Cr. App.), *cert. denied,* 548 So.2d 1062 (Ala. 1989); *Baldwin v. State,* 539 So.2d 1103, 1105 (Ala. Cr. App. 1988), *cert. denied,* 539 So.2d 1103 (Ala. 1989), *cert. denied,* 110 S.Ct. 206 (1989); *Bell v. State,* 518 So.2d 840 (Ala. Cr. App. 1988), *cert. denied,* 486 U.S. 1036 (1988); *Dobard v. State,* 455 So.2d 281, 283 (Ala. Cr. App. 1984); *Richardson v. State,* 419 So.2d 289, 291 (Ala. Cr. App.), *cert. denied,* 419 So.2d 289 (Ala. 1982), *cert. denied,* 460 U.S. 1017 (1983).

B. Claims Which Could Have Been But Were Not Raised At Trial Or On Direct Appeal Are Precluded From Review

Fourteen of Jones' claims are barred from review by his failure to raise them at trial and/or on direct appeal. These fourteen claims are as follows:

> Claim C - The trial court's instructions on capital murder and the lesser included offenses of murder in the first degree and murder in the second degree were inadequate and violated petitioner's rights to due process of law and to a fair trial;
>
> Claim D - The trial court's instruction on "intent" and "malice" was burden-shifting and violated petitioner's rights to a fair trial and due process;
>
> Claim E - The trial court and the appellate courts failure to consider mitigating evidence that was clear from the record violated Alabama law and peti-

tioner's rights under the Eighth and Fourteenth Amendments to the United States Constitution;

Claim F - The failure to transcribe fully all trial court proceedings and to preserve and secure all physical evidence and trial exhibits deprived petitioner of full appeal and statutorily mandated review of his capital sentence and conviction;

Claim G - Petitioner was deprived of due process, equal protection, and a fair trial and sentencing determination due to the trial court's refusal to provide funds for expert assistance;

Claim H - The admission over objection of the statement made by petitioner violated his rights under the Fifth, Sixth, Eighth, and Fourteen Amendments and Alabama law;

Claim I - Petitioner's rights to stand trial were violated for failure to hold a hearing concerning his competency to stand trial;

Claim J - The State's introduction at trial of highly inflammatory and prejudicial photographs of the victims violated petitioner's rights;

Claim K - The prosecutor's misconduct and arguments during the guilt/innocence phase of petitioner's trial and at the sentencing hearing before the court were improper and deprived him of rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the State Constitution of Alabama;

Claim L - Petitioner was denied a fair trial by the prosecutor's improper closing argument during both the guilt/innocence and the penalty stage, including references to the worth of the victim, the victim's

family and the racist, inflammatory; and prejudicial characterization of petitioner;

Claim M - Petitioner was convicted of capital murder and sentenced to death despite a lack of evidence of intent to kill;

Claim N - Petitioner's sentence of death is unconstitutional because it was sought and imposed pursuant to a pattern of racial basis in the imposition of the death penalty;

Claim O - The Alabama death penalty statute violates the Sixth, Eighth and Fourteenth Amendments and the Alabama Constitution by failing to provide meaningful comparative review for those under the sentence of death; and,

Claim P - Electrocution as a means of punishment violates the Eighth Amendment's prohibition against cruel and unusual punishment.

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

An evidentiary hearing was held on Jones' claim that he was denied effective assistance of counsel at trial and on appeal. At the Rule 32 hearing, Jones was represented by counsel and presented evidence, in the form of testimony and exhibits, in support of this claim. Based on the evidence presented, including the Court's's observation and evaluation of the witnesses' demeanor, this Court concludes that Jones failed to prove that trial counsel rendered ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was deficient and that he was prejudiced by that deficient performance. *Strickland v. Washington*, 466 U.S. 668, 104

S.Ct. 2052, 80 L.Ed 2d 674 (1984). This Court must avoid using the benefit of hindsight and must evaluate the counsel's conduct as of the time of trial. *Ex parte Lawley,* 512 So.2d 1370 (Ala. 1987). When the Court is reviewing a claim of ineffective assistance of counsel, it must indulge a strong presumption that counsel's conduct was appropriate and reasonable.

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act, or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689, 104 S.Ct. at 2065-66. (Citations omitted.) *Ex parte Lawley,* 512 So.2d 1370, 1372 (Ala. 1987). "Counsel's conduct must be considered within the context of the facts of the particular case and as of the time of the alleged misconduct." *Ex parte Baldwin,*

456 So.2d 129, 134 (Ala.1984), *aff'd*, 472 U.S. 373, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985). *State v. Tarver*, 629 So.2d 14 (Ala. Cr. App. 1993).

A. Ineffective Assistance Of Counsel At Trial

Jones was originally tried, convicted and sentenced to death in 1979. His counsel at that time was the Honorable Thomas Roundtree. Jack Davis was retained by the Jones family and made an appearance on behalf of Jones on July 23, 1979, the day that trial began. (CR. 120).[1] During the course of jury selection another attorney, Lee Butcher, appeared. (CR. 130). Both Davis and Butcher participated in the trial and were present for the rendition of the verdict. Davis and Butcher asked to be appointed to pursue the appeal. Subsequently, Davis filed on behalf of Jones a motion for new trial. (CR. 156, 157, and 158). Roundtree continued as counsel on appeal.

The judgment of conviction was subsequently reversed and the cause remanded on the authority of *Beck v. Alabama*. On remand, Jack Davis represented the petitioner and filed numerous pre-trial motions. (CR. 10-14).

George Boles, a partner of Davis, became involved in Jones' trial for the purpose of negotiating a plea agreement. An agreement was reached with the district attorney that in exchange for a plea, Jones would be sentenced to life imprisonment without parole. When presented with the offer, Jones forcefully rejected it, stating "I ain't copping a plea to nothing." (Evid. Hearing R. 57-58). Boles subsequently represented Jones at his second trial along with Davis.

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[1] In referencing page numbers to specific parts of the records, "CR" refers to the clerk's record of the transcript of the 1979 and 1982 trials, "R" refers to the transcribed hearings and testimony of the 1982 trial and "Evid. Hearing" refers to the record of testimony of the Rule 32 hearing.

After conviction and sentence, Davis and Boles were appointed counsel for purpose of appeal. Boles filed the appeal.

George Boles testified at the Rule 32 hearing before this Court. Jack Davis is now deceased.

1. Failure To Investigate and Prepare A Defense

Petitioner contends that Davis and Boles were ineffective during all aspects of their representation of him in 1982. Petitioner alleges that counsel failed to investigate and prepare for trial, and failed to adequately present a defense during Jones' trial. The clerk's record of the 1979 trial and the complete record of the 1982 trial admitted into evidence and considered by this Court rebut the contentions of petitioner.

Jack Davis participated in the first trial and was co-counsel to Mr. Roundtree. Having participated in the prior trial, Davis was intimately acquainted with all the facts, circumstances and evidence necessary to adequately represent Jones in 1982. At trial in 1982, Davis and Boles presented a reasonable, coherent defense of Jones. It is evident from the record that Jones denied any involvement in the murders. Instead, he claimed that he was present but did not inflict any knife wounds or gunshot wounds to the victims. The State's case depended upon the statements of the Nelson children who were surviving victims, and the confession of Jones. Boles aggressively attacked the witnesses' versions of events. Counsel impeached Brenda Nelson with prior inconsistent statements that she had made. In fact, counsel had admitted her prior inconsistent statements over the objections of the State and prevented the State from admitting into evidence the entirety of her statements. Counsel also vigorously opposed the admission of Jones' confession during

the hearing on their motion to suppress and during the testimony of the State's witnesses before the jury. Review of Mr. Davis' and Mr. Boles' examination of witnesses at trial confirms that both trial counsel were well prepared and were knowledgeable of all the facts and circumstances of the crime.

Petitioner now, in Rule 32, presents a different defense theory and strategy to this Court. That strategy and defense is that Jones was at the scene of the murder, was asked to enter the house after the co-defendant Giles had shot and stabbed the victims, and that Jones, at Giles' command stabbed the victims. Although he stabbed the victims, petitioner now claims that evidence shows that Carl and Willene Nelson were deceased at the time he inflicted the wounds on their bodies; therefore, this is evidence of Jones' lack of intent to commit murder. The presentation of this new theory is no more than second guessing trial counsel's performance after petitioner's conviction and adverse sentence when the defense at trial proved to be unsuccessful. This is the situation of which *Strickland* warned.

Under the circumstances, and evaluating the conduct of counsel and their perspective at the time of the challenged conduct, it is clear, based upon the first trial and the statements of Jones during his sentencing in the first case, (CR 27, 28, 30, [illegible]), that Jones was denying that he inflicted any wounds whatsoever on the victims. It is clear from his statements to the trial court concerning his attorney that this was his plea and that he was dissatisfied with his attorney, Mr. Roundtree, for trying to present a mental health defense. The record also shows that petitioner alleged that his confession was only made because of promises made by the sheriff's department concerning bond and that the statement was not true but that he was coerced into making it. It would have been unreasonable

for counsel to argue before the jury the alternative, contradictory theory that petitioner now presents before this Court.

Under the circumstances that existed at the time of trial counsel could not have presented the defense now offered, and therefore was not ineffective for not developing the strategy concerning the timing of the fatal blows and the blows that petitioner now argues that he did inflict. Trial counsel had the benefit of hindsight from the first trial in which to prepare and try the 1982 case for petitioner. This Court, however, may not indulge in hindsight in its scrutiny of trial counsel's conduct.

2. Failure To Obtain Change Of Venue

Petitioner raises several issues concerning a change of venue. He alleges that trial counsel was ineffective in every aspect from filing to presenting evidence in support of a change of venue motion. Although petitioner has offered an opinion as to what trial counsel should have done, he has presented no evidence to support his allegations of ineffective assistance of counsel concerning the change of venue. Based upon review of the record of the trial and the record of the Rule 32 proceedings and *Jones v. State,* 520 So.2d 534 (Ala. Cr. App. 1983), in which the Court of Criminal Appeals addressed the issue of change of venue and decided it contrary to petitioner, there is no merit to the allegations concerning the change of venue hearing.

3. Ineffective Assistance In Jury Selection

Petitioner also raises an issue concerning the jury selection process. No evidence was presented by petitioner as to the issue of ineffective assistance of counsel during the jury selection process. There was no testimony as to the racial composition of the jury or the striking of the jury.

This Court finds from review of the record that the voir dire of the venire was extensive and reasonable under the circumstances that existed at the time of trial. The trial court allowed individual voir dire when necessary and petitioner has presented no evidence as to the effect on the jury of collective voir dire. Additionally, petitioner has shown no evidence that the jury was partial because of the voir dire conducted by trial counsel, therefore, petitioner has not met his burden and this issue is without merit. Petitioner has also not presented any evidence in support of his claim that trial counsel improperly waived petitioner's right to a sequestered jury, therefore, petitioner has not met his burden as to this allegation, and this allegation is without merit.

4. Failure To Make Certain Motions

Petitioner contends that trial counsel was ineffective in failing to make a number of pre-trial and trial motions. As to a motion for directed verdict, this was without merit in that said motion would have been frivolous since the State proved all necessary elements of capital murder.

Petitioner has failed to show that there was error in trial counsel not moving for a motion for new trial; motion for entire recordation; motion to view the crime scene; and the motion to disclose all impeachment or exculpatory testimony by the victim.

5. Failure To Obtain Proper Jury Instructions

As to any error concerning jury instructions, this Court has reviewed the jury instructions given at the trial and concludes that the instructions were proper, that there was no error in the instructions and that under the facts of this case, a manslaughter instruction to the jury would have

been inappropriate. Therefore, claims concerning jury instructions are without merit.

6. Failure To Poll Jury

The claim that counsel was ineffective because they did not poll the jury is without merit. No evidence was presented by petitioner that the vote of the jury was not the vote of the individual jurors, therefore, petitioner has not met his burden under *Strickland.*

7. Failure To Cross Examine State Witnesses

Petitioner claims that trial counsel failed to investigate and adequately cross examine critical state witnesses including Tony Nelson, Brenda Nelson, Charlie Nelson and the police officers who took petitioner's confession. Review of the transcript of petitioner's trial shows that counsel more than adequately cross-examined these witnesses and elicited the testimony that was necessary to support the defense interposed by petitioner. The cross-examination of these witnesses was detailed and exhaustive. Therefore, this issue is without merit.

8. Failure To Object To Prosecutor's Comments

Trial counsel is alleged to be ineffective in that they did not object to the comments made by the prosecutor during closing argument at both the guilt and sentencing phases. Trial counsel is not required to make every conceivable objection at trial. In reviewing allegedly improper prosecutorial comments and conduct, the task of the Court is to consider the impact within the context of the particular trial, and not to view the allegedly improper acts in the abstract. Moreover, statements of counsel in argument to

the jury must be viewed as delivered in the heat of debate: such statements are usually valued at their worth and are not expected to become factors in the formulation of the verdict. *Bankhead v. State,* 585 So.2d 97, 105-07 (Ala. Cr. App. 1989), *remanded on other grounds,* 558 So.2d 112 (Ala. 1991). After reviewing the arguments of the prosecutor in the context of this particular trial, this Court is of the opinion that the argument of the prosecutor did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. The use of the terms "blood-thirsty savage" and "blood-thirsty murderer" in the context of this crime is no more than a reasonable inference from the evidence that the prosecutor is allowed to make.

A review of the closing argument made at the guilt phase and at the sentencing phase show no comments concerning petitioner's right not to take the stand and testify. Therefore, this issue is without merit.

B. The Claim That Trial Counsel Failed To Present Any Mitigation Evidence

Petitioner claims that trial counsel were ineffective in failing to adequately prepare for the penalty phase of petitioner's trial. He states that mitigating circumstances existed as to petitioner's mental health, primarily to show that petitioner was subject to domination by co-defendant Giles; that details about defendant's personal history were mitigating; and that there was evidence of mitigation in the form of expert testimony proving that petitioner did not deliver the fatal blows to the victims.

1. Mental Health Mitigating Evidence

At the evidentiary hearing, Petitioner presented the testimony of Dr. Brad Fisher, an expert in clinical forensic

psychology. (Evidentiary Hearing R. 284). Dr. Fisher testified that petitioner suffered at the time of the crime and continues to suffer from significant mental conditions. These mental conditions are (1) dependency and suggestibility, (2) multi-substance abuse, (3) organic impairment, and (4) major thought disorder. (Evidentiary Hearing R. 293-294). In forming his opinion, Dr. Fisher reviewed medical records, prison records, affidavits of family members, prior court records and an evaluation of the petitioner. Additionally, he interviewed the family members. The evaluation of petitioner was conducted during a seven to eight hour period on November 30 and December 1 of 1994. On November 30, 1994, he interviewed petitioner's mother, Maritha Erby and interviewed other family members on the 12th of November 1995, the Sunday before the evidentiary hearing in this matter. That interview included interviews with petitioner's mother; with his sister, Glen Jones; his brother, Henry Erby; his sister, Phyllis Faevers; his uncle, Johnny Wright; and his niece, Barbara Jones. (Evidentiary Hearing R. 289-290).

The prison records consisted of depositions from Dr. Thomas L. Smith and Dr. James C. Thompson in 1979, including the 1979 evaluation by Drs. Thompson and Smith done at Bryce Hospital and the medical records from petitioner's stay in prison.

The record reflects that counsel for petitioner investigated and pursued a mental health defense for the first trial. Petitioner had been evaluated by the Lunacy Commission. Previous counsel, during the first trial, had filed appropriate motions for mental evaluations and had conducted depositions of the mental health experts who evaluated petitioner. The trial court subsequently denied the motion for private psychiatric examination and testing and funds for an expert witness in the field of mental health to perform intelligence and personality tests on the peti-

tioner. (CR. 204-205). Thereafter, petitioner was granted his right to refile his motion for psychiatric examination and said motion was granted. (CR. 106).

Subsequently, in preparation for the second trial, Jack Davis filed a motion for expert witnesses including mental health experts and filed a motion for private psychiatric examination and testing. (CR. 204-205). That was denied by the Court on December 7, 1982. (CR. 205). This Court finds that counsel in the 1982 trial filed the appropriate motions requesting mental health experts and the appropriate evaluations and tests to be performed upon petitioner and was denied relief by the Count. Petitioner claims that Davis and Boles did not adequately present the testimony available to them as to the mental health of the petitioner and had they presented the available information, they would have been allowed to present the testimony before the jury.

This Court, after having reviewed the records that were reviewed by Dr. Fisher, the testimony of witnesses and the depositions submitted by both parties of the prison physicians that treated the petitioner, finds that the basis for Dr. Fisher's opinion is questionable.

The first area of doubt is the diagnosis of psychosis. It appears that the original diagnosis was made by Dr. Richard Cooksey, a general practitioner for inmates in the prison system. On October 17, 1991, he examined the petitioner for weight loss. Petitioner had a weight loss problem and Dr. Cooksey, not finding a physical reason for the problem, doubted an organic basis for the weight loss and felt that the weight loss was a result of petitioner just not eating. Petitioner told him that he would not eat anything on his tray if the tray came in contact with anything "unclean". Although in his records he wrote that petitioner admitted auditory hallucinations, the doctor admitted that they were poorly described at the time.

(Page 21, Deposition of Dr. Cooksey). The doctor could remember nothing about the nature of the hallucinations. Admitting that he was not a psychiatrist, the doctor stated, "If he is not eating, he's psychotic. That's pretty much normal day-to-day functioning, eating." (Page 22, Deposition Dr. Cooksey). When asked what percentage of inmates whom he saw at Donaldson Correctional Facility did he believe to be psychotic, he stated that it was common enough where it doesn't really stand out at that institution, inferring that he believed many of the inmates he saw were psychotic. (Pages 24-25, Deposition Dr. Cooksey). He made notes reflecting his diagnosis of petitioner in the medical records of petitioner and recommended that petitioner would be best served at Kilby Correctional Institution where he would get treatment for his mental health.

Two psychiatrists treated the petitioner during his stay in prison, Dr. Blankenship and Dr. Joseph. From their depositions and from the record it appears that these doctors did not perform any individualized testing or evaluations of petitioner. Most examinations were routine and consisted of asking a series of form questions to which the petitioner would answer. The interviews were short, usually about eight minutes in length. They read the "diagnosis" of Dr. Cooksey and treated petitioner for psychosis by giving him Haldol for his reported hallucinations. These doctors also could not describe specific hallucinations. Therefore, even though the medical records indicate some sort of mental health history, including earlier records of the Lunacy Commission, this Court concludes that there has been no reasonable dependable diagnosis of psychosis to support the opinion of Dr. Fisher and indeed it appears to this Court that there is no evidence of psychosis.

Although Dr. Fisher states that his testing showed that there is some organicity in the psychosis and other mental problems of the petitioner, there is no evidence to support this opinion. Dr. Fisher admitted that he could not obtain closure on this issue. This Court notes that it allowed the petitioner to be tested for any organic basis for mental health problems. Petitioner was transported to a facility which could perform the tests, but no test results or testimony was presented to this Court as to the result of those tests. Therefore, this Court concludes that there is no evidence of an organic basis for any mental health problems the petitioner might have.

The diagnosis of low intelligence is rebutted by the testimony of family members who stated that the petitioner did well in school and no evidence was presented to contradict that. Although the petitioner quit school before he graduated, he did later obtain his GED, which rebuts any evidence of low intelligence to the point where it would have an effect on the outcome of his trial or sentencing,

Dr. Fisher testified that the petitioner was dependent and easily led by outside influences because of his upbringing, and that he was unable to make independent decisions. The basis of this opinion was the testimony of family members. Dr. Fisher's opinion was that with extensive and consistent abuse and abandonment as a child, one is more likely than a child who has not been consistently abused and abandoned to develop major psychological problems. (Evidentiary Hearing R. 308). There is no doubt that petitioner lived with different relatives and that there was some physical abuse but the evidence of physical abuse is negligible.

Petitioner's sister, Glen Jones, testified to abuse by their father. She testified that her father was rarely around but when he did come that he would make petitioner and Glen take off their clothes, would tie them to a door knob

and beat them with a cord. She testified that the beatings with a cord were so severe that wire from the extension cord was embedded in their flesh. The Court concludes that this is an exaggeration and that had this abuse occurred there would be some obvious scarring from where such young children were beaten to the point where the insulation of an extension cord was torn off and wire was embedded in their skin. The other evidence of abuse is negligible.

The opinion of Dr. Fisher as to the effects upon petitioner of this "abusive childhood" is rebutted by other family members that testified, including Glen Jones. Their testimony suggests that, although petitioner had to live with relatives and was beaten by his father and had other problems with family members, he adjusted well. Petitioner made good grades in school and had no trouble with teachers. He was helpful to people and was polite and well behaved. He was able to maintain employment and although he had a few problems with attendance, was generally considered to be a good worker. Petitioner attended church and played in the school band. He was not a violent person growing up.

Mr. Wright, Jones' uncle, testified that petitioner was capable of making his own decisions but that he basically followed his friends. When asked if the problems that petitioner faced growing up in the neighborhood and the pressures from his friends who used drugs were not the normal pressures that anyone faced growing up where Jones did, Wright answered yes. (Evidentiary Hearing R. 224). He followed his friends who were into drugs because they were his childhood friends and although some of them were not into drugs, some were. He followed the example of people who did not get into trouble but, "[i]t just happened that he was with the ones that had got into trouble." (Evidentiary Hearing R. 245).

This Court agrees that the pressures that petitioner was under in his neighborhood and in his upbringing were pressures normally faced by individuals in his situation, and therefore, do not exhibit any individual, unique tendency in the personality of petitioner to follow the wrong example.

All the testimony as to drug use reflects that the drug use was voluntary and there was no evidence of organic effects of his long term drug use. Voluntary drug use has never excused or mitigated a crime of this nature in the State of Alabama nor does it in this case.

After considering the testimony of Dr. Fisher and examining the basis from which he formed his opinion, this Court is of the opinion that there is no credible evidence of significant mental health problems in petitioner.

2. Forensic Evidence

At his evidentiary hearing, petitioner presented forensic evidence to prove that the he did not deliver the fatal blows to the victims. As previously discussed, this theory would have conflicted with the theory presented at trial by Davis and Boles and would not have been reasonable to present before the jury under the circumstances. This evidence could have been presented before the Court at sentencing for purposes of mitigation.

The petitioner presented the testimony of Dr. Bryan Frist. Dr: Frist is employed as a forensic pathologist in Atlanta, Georgia, and, although not certified as a forensic pathologist, he testified as to his experience in this field. This testimony was based on his review of crime scene photos and the 1978 autopsy reports on Carl and Willene Nelson, along with review of portions of testimony from the trial transcripts. His opinion is that Carl Nelson was killed by a gunshot wound. He testified that the testimony at trial showed that co-defendant Giles shot Carl Nelson

and that death was instantaneous and occurred prior to being stabbed. His opinion as to Willene Nelson was that she died of stab wounds and that the person who began stabbing her was the one that killed her. According to the trial testimony that individual would have been Giles.

The State presented the deposition of Dr. Embry, a certified forensic pathologist. Dr. Embry actually performed the autopsy on the victims and testified in the 1982 trial.

As to Willene Nelson, there was testimony at trial from Charlie Nelson, one of the children, and also a surviving victim, that he heard his mother moaning before she was stabbed by Jones. Dr. Frist attempted to give an explanation for the moaning as simply fluids building up in the lungs and that said noises were not unusual. It is the Court's opinion that this is not a reasonable explanation for the moaning of the victim. The Court therefore finds that the evidence shows that Willene Nelson was indeed alive and moaning before she was stabbed by Aaron Jones. When asked the basis of his assumption that the first person that started stabbing Willene was the one who inflicted the fatal wounds, Dr. Frist stated that with all the defensive wounds and all the stab wounds on her, there would be a lot of blood around because she would have continued struggling until she died and that was not the case with the murder scene. When asked if she could have fainted or otherwise passed out before she received the fatal wound, Frist agreed, but stated that he would have to have an explanation of why Willene passed out. He stated that she did not pass out from loss of blood and she did not have a medical reason for passing out. He admitted that she may have had another reason but that she did not have a physical reason to pass out. He stated there were no blows significant enough to cause her to pass out.

There is significant evidence that Willene Nelson was pistol-whipped before she was killed. Dr. Embry's autopsy report is specific and describes numerous injuries to her head, and concluded that the instrument that made those injuries created patterns that matched the grip of a pistol. There was testimony from witnesses at trial that she was being beaten as well. Essentially, Dr. Frist's opinion is based upon his experience with facts of other cases and not with the medical evidence available. Dr. Frist stated the following:

> I have done cases where we know the perpetrator goes into a residence. He does the murder or the act and then goes outside and tells his cohort 'You have to do something', to tie him in and make him part of the crime. I believe that is what happened here. (Evidentiary Hearing R. 87-A).

Therefore his opinion goes outside his medical expertise and involves interpreting this case within a theory developed from the facts of other cases.

Dr. Embry in his deposition on March 8, 1996, defended his opinions that he testified to in 1982 and the autopsies that he performed on Carl and Willene Nelson. Dr. Frist stated that death to Carl Nelson from the gunshot wound to his heart was instantaneous and that any further wounds would have been post-mortem. Dr. Embry stated simply that the amount of blood he found in the cranial cavity was of such an amount to show that there was blood pressure after Carl Nelson was shot through the heart. The blood was the result of the knife wound that he had previously testified would have been fatal and was delivered before death. Dr. Embry stated that a wound to the heart with a low caliber handgun, either .22 or .32, would not necessarily cause instantaneous death and that the heart would continue to beat for several minutes. He

testified that Carl Nelson's wound was such a wound and that the heart continued to beat and that such was evident by the hemorrhaging around the knife wound. As the caliber of the bullet increases, the damage to the heart is more severe and a large caliber bullet would cause, in most cases, instantaneous death. That was not the case in the death of Carl Nelson.

This Court credits the testimony of Dr. Embry and does not credit the testimony of Dr. Frist. Dr. Frist overlooked the possibility that Willene Nelson simply passed out on the floor during the brutal pistol whipping and stabbing that she was enduring. This discounts his testimony as to the amount of blood in the areas of the murder and the fact that there was not much blood spread around by Willene Nelson because she was incapacitated. The testimony of witnesses who heard Willene Nelson moaning before she was stabbed by Aaron Jones has not been convincingly rebutted. Dr. Frist's conclusory statement that there was not enough blood in the skull cavity to show that there was blood pressure after the shooting of Carl Nelson is rebutted by the testimony of Dr. Embry.

This Court concludes that the testimony of Dr. Frist would not have been considered mitigating by the jury nor to the Court. Additionally, this crime was so savage and brutal that participation in any way by the petitioner would have weighed conclusively against mitigating his involvement on the basis of who was the particular individual who delivered the fatal blow to the victims.

3. Other Mitigating Evidence

During the Rule 32 hearing, the petitioner presented family members and others to testify as to his upbringing to establish that there was mitigating evidence that was available to trial counsel and that counsel were ineffective in not presenting this evidence to the jury and to the Court

during the sentencing stage of trial. These witnesses were: Maritha Erby, Phyllis Faevers, Glen Jones, Barbara Ann Jones, Johnny Wright, Willie Woods, and Henry Erby. This Court finds that the evidence presented by these witnesses does not establish any mitigating circumstances nor does it evidence any possible mitigating circumstance that would have changed the outcome of the jury recommendation or the judgment and sentence of the trial court.

Glen Jones was the primary witness relied upon by petitioner. She testified that she and petitioner, brother and sister, lived with relatives because their mother and father could not take care of them. She testified that her father visited occasionally and that when he did he would strip them of their clothes, tie them to a doorknob and would viciously beat them with an extension cord to the extent that, after the beatings, petitioner and Glen would have to remove pieces of the wire which were embedded in their flesh. She testified that petitioner did not respond to these beating but took it quietly. He kept everything within himself.

She testified about petitioner's drug use. Particularly, the night of the murders, prior to his leaving with Giles to go to the Nelsons, he was using drugs in her house.

She acquiesced to her brother's drug use, but stated that she didn't allow anyone else to use drugs in her home. She then testified that others were using drugs that night in her house. Most of the testimony, though, centered around herself. As to the problems that she experienced in childhood and growing up, she blamed everyone but herself. Consistent with this testimony, she also claimed that her brother was not responsible for anything that he had done, as far as this crime or past crimes, and that it was also someone else's fault for his problems.

Other examples of abuse by relatives or others that she described are almost negligible. The thrust of her testi-

mony concerning her brother was that other people made him do the things that he did.

Glen Jones had testified at the first trial in 1979. She later testified at the evidentiary hearing that if she had testified at the second trial, her testimony would have been the same as that at the first trial. The only other thing that she would have added would be the additional facts concerning the sexual abuse that she endured by her father. (Evidentiary Hearing 212-213). George Boles testified that trial counsel had problems with her testimony in the first trial and did not want it presented at the second trial.

It is easy to see why counsel would be reluctant to call Glen Jones for the second trial after hearing her testimony from the first trial. The petitioner was at her house the night of the murders. The sister testified that prior to leaving with Giles to go to the Nelsons, Jones was shooting drugs in her house. She did not question or object to the use of drugs by her brother in her house with her children present. She also testified as to the extent that everybody was intoxicated or high, which was also testified as to the extent that everybody was intoxicated or high, which was inconsistent with her testimony that she allowed no one but her brother to use drugs in her home. Her testimony as to how Giles talked Jones, the petitioner, into going to the Nelsons, shows that there was not much coercion utilized by Giles. He simply asked Jones more than once to go and Jones agreed. This testimony would have seriously prejudiced the petitioner in the trial of this case and since petitioner was convicted in his 1979 trial, trial counsel in the 1982 trial had good reason to avoid using Glen Jones as a witness.

Her testimony in favor of her brother, the petitioner, is outweighed by the prejudicial effect. Glen Jones blamed every negative aspect about her life on someone else. She blamed everyone else for the problems that petitioner had

gotten himself into throughout his life. Trial counsel were leery of putting witnesses on to make excuses and this is a prime example of the testimony that trial counsel feared. In reviewing the testimony of Glen Jones, this Court is of the opinion that it was a sound strategic decision of trial counsel not to present Glen Jones as a witness at trial.

Glen Jones additionally testified to facts that would show that her brother had adjusted well to his upbringing. She, as well as all of the other witnesses, testified that there were many positive aspects of the petitioner. He was not a violent person, he did well in school, he did not give teachers any trouble in school, he was helpful to everyone, including Glen Jones' daughter, Barbara Ann Jones, was able to maintain employment and generally was a good worker.

Henry Erby testified that the problem with petitioner was that he followed the wrong friends. These friends were his childhood friends and some of them used drugs and he followed them instead of the good influences. He also testified that the influences in his life were the same as anyone else growing up in that neighborhood and that it wasn't unusual in some of the neighborhoods for some of the children to

The mitigating evidence presented by the petitioner shows no more than a child of a broken family that had positive and negative influences in his life but chose to follow the friends that he grew up with that were taking drugs. From the testimony of these witnesses it is apparent that petitioner had the ability to do well in school, had people in whom he could confide and by whom he could be advised, was involved in church activities such as choir and other extra curricular activities such as playing in the school band. The petitioner's temperament was peaceful and the only negative influence appears to be the influence of his friends who used drugs.

Aaron Jones had the abilities and the opportunities to make the choices that everyone has to make in life and made the incorrect choice. When Aaron Jones started using drugs his life changed. His mitigation is that the drugs made him commit the crime. Frequently this has been interposed as a defense and as mitigation but it has never been accepted as an excuse to mitigate this type of crime.

The testimony of these witnesses is unconvincing. Had it been presented to the jury it would not establish mitigation for the acts of the petitioner.

JUROR MISCONDUCT

The petitioner raises two claims concerning juror misconduct:

> Claim R - Petitioner was denied his tight to be tried by an impartial jury as guarantee by the Sixth Amendment of the United States Constitution because of false answers given by a juror at voir dire prevented petitioner from effectively utilizing his jury strikes;
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> Claim S - Petitioner was prejudiced by juror misconduct at the penalty phase because his death sentence was the result of coercive influences brought into jury deliberations which were outside the scope of evidence and judicial control.

As to Claim S, the petitioner alleges that juror J.D. Moss told other members of the jury that, based on his experience as a juror in other criminal trials, the petitioner would be out of prison in just a few years if they did not vote for the death penalty. A motion was made by the State at the time this testimony was presented at the evi-

dentiary hearing that this evidence was not admissible to impeach the jury verdict and was not an exception to the general rule that only outside influences are scrutinized by the courts as to their effect upon a jury's verdict. Alabama law forbids the disclosure of this type of evidence to impeach a jury's verdict. *Adair v. State,* 641 So.2d 309 (Ala. Cr. App. 1993), *Horth v. State,* 553 So.2d 694 (Ala. Cr. App. 1989); and *Allen v. State,* 494 So.2d 777 (Ala. Cr. App. 1985). The Court of Criminal Appeals has considered this type of "misconduct" in the case of *Garraway v. State,* 337 So.2d 1349 (Ala. Cr. App. 1976), and concluded that comments such as juror Moss made concerning parole to be the type of evidence not admissible to impeach a jury's verdict. Therefore, this issue is without merit.

As to Claim R, petitioner contends that juror J.D. Moss knew Sheriff J.C. Carr and the deputies that testified for the prosecution at trial but did not respond when defense counsel asked the venire panel whether anyone knew these individuals. Additionally, the petitioner claims that Moss knew the victims, had been in the victims' home on more than one occasion and was familiar with the interior of their house, but did not disclose this information when questioned during voir dire. This Court addresses this claim as a claim of newly discovered evidence.

On voir dire the prosecution asked, "Do any of you know any member of the Nelson family?" Mr. Moss raised his hand and answered in the affirmative. (R. 41). The district attorney asked further questions, first of the other juror who had responded that she knew a member of the Nelson family and then of Mr. Moss. In questioning the other juror, the prosecution asked her if the fact that she knew the Nelsons would affect her in any way and if she were selected to sit on the jury could she listen to the sworn testimony from the witness stand and the law the

judge gave her and render a verdict based solely on the evidence that was heard in the courtroom and on the law that the judge gave. The first juror had some doubt as to whether she could disregard the fact that she knew some of the Nelsons. Mr. Moss, though, when asked, "Do you think you could go entirely on the sworn testimony of the law as the judge charges you?", answered "Yes." (R. 42). Since Moss answered the question of the prosecution as to whether he knew any of the Nelsons, there is no jury misconduct. Since he could disregard the fact that he knew them and rely only on the trial testimony, there was no prejudice.

Mr. Boles (petitioner's trial counsel), during his voir dire of the panel including Mr. Moss, asked

> Do any of you know J.C. Carr? Every one in the county knows J.C. Carr—Seventy-two percent of you voted for him and kept him in office for six terms. My question would be with respect if you know him on a personal basis—member of the same church, or social organizations that you feel it would affect the way you receive the testimony from J.C. or some of his deputies? (R. 50).

Boles further asked if anyone knew Tom Ed Dickey, Billy Irving, or Fred Allcorn, Sheriff Carr's deputies. There was no response from any of the venire members including Mr. Moss.

It is clear that trial counsel knew that everyone in the county knew the sheriff and was questioning as to whether any member of the venire had a personal relationship with the sheriff or his deputies that would affect the way that they received the testimony from the sheriff or deputies. Petitioner has not presented any evidence to show that juror Moss knew any of the members of the sheriffs department on a personal basis and that the rela-

tionship, if it existed, affected his verdict. Therefore, there is no evidence of juror misconduct. Moss responded to voir dire questioning in other matters and had a personal relationship with the sheriff or his deputies actually existed, as was asked, there is no evidence that he would not have answered truthfully.

During the Rule 32 evidentiary hearing, Moss was asked if his business brought him in contact with a large number of citizens in Blount County. The juror admitted that he knew just about everybody "around". In answer to petitioner's questions, Moss stated that he knew the sheriff and his deputies well enough to form an opinion as to whether or not he found them to be honest and truthful. Although the answer was in the affirmative as to each, on cross examination he stated that the fact that he knew the judge, the sheriff and his deputies did not affect his verdict. He recalled the instructions of the court that he was to make a decision on the verdict and the sentence based only upon the instructions from the court and the evidence presented at trial. He further stated that he was able to follow those directions even though he knew everyone and even though he knew the sheriff and his deputies to be truthful people. Regardless of his opinions, he was able to disregard them when he entered deliberations to render a verdict. He further stated that he rendered his decision based upon only what he heard from the witnesses and the instruct ions from the judge.

Under the law of this state, the test is whether the petitioner might have been prejudiced, not whether he actually was prejudiced. Both parties at trial have a right to honest answers from venire members so that fully informed decisions can be made in striking a jury.

When prospective jurors fail to answer questions correctly the parties are denied that right. It is the court that must determine whether a response or a lack of a response

has resulted in probable prejudice to the petitioner. The question of prejudice is primarily within the trial court's sound discretion.

Although the petitioner has a right to have questions answered truthfully on voir dire examination of the venire, the failure of a juror to make a proper response to a question regarding his qualifications to serve as a juror does not automatically entitle the petitioner to a new trial. The proper inquiry is whether the petitioner's rights were prejudiced by the juror's failure to properly and correctly respond. *Thomas v. State*, 622 So.2d 415 (Ala. Cr. App. 1992).

Even if the juror had been guilty of misconduct, this Court is not convinced by the evidence that the petitioner's rights were prejudiced. As brought out by petitioner's counsel, Moss, in his business, knew almost everyone in the area. He knew the Nelsons because he was working with a local gas company doing service work. The only part of the layout of the house that he was familiar with was the back porch and kitchen. No evidence was presented that this juror used his personal knowledge of the layout of the victims' home in his deliberations or conveyed that information to the other members of the jury. There is no evidence that his knowledge of the sheriff and the deputies caused him to give their testimony more weight than any other witness.

The trial court specifically charged the jury as to the reconciliation of all the testimony. (R. 401-403). The Court made it clear that the rules concerning the jury's discretion on what testimony they would believe or would not believe applies to all the witnesses. (R. 401, 402, 403). The juror testified that he considered the Court's instructions and based his verdict upon the Court's instructions and the testimony that was presented during trial. Therefore, the petitioner has not met his burden in

showing that first, there was jury misconduct and second, that had there been juror misconduct that the petitioner was prejudiced thereby. This issue is without merit.

NEWLY DISCOVERED EVIDENCE

The petitioner cites as grounds for relief from his conviction and sentence the following:

> Claim Q - Newly discovered evidence relating directly to the conviction and sentencin of petitioner requires post conviction relief.

Petitioner claims there is newly discovered evidence critical to the issues of conviction and sentencing that has arisen since the trial of this petitioner. Specifically, at the 1991 sentencing hearing of Arthur Lee Giles, the co-defendant in this case, Brenda Nelson, the State's primary eyewitness in the trial of Jones, testified that she had seen Arthur Lee Giles, not the petitioner, "killing" her mother with a knife. Petitioner claims that such testimony was not available at the time of petitioner's trial and would have changed the outcome of the trial if presented to the jury and this Court.

This claim is without merit. Rule 32.1(e) provides that as a ground for relief, that "(n)ewly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:

1. The facts relied upon were not known by petitioner or petitioner's counsel at the time of trial or sentencing or in time to file a post trial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of

those times through the exercise of reasonable diligence;

2. The facts are not merely cumulative to other facts that were known;

3. The facts do not merely amount to impeachment evidence;

4. If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and

5. The facts establish that petitioner is innocent of the crime for which petitioner was convicted or should not have received the sentence that petitioner received.

Rule 32.1(e), Alabama Rules of Criminal Procedure.

The alleged "newly discovered evidence" consists of the testimony of Brenda Nelson, the State's primary eyewitness in the trial of Mr. Jones, at the 1991 sentencing hearing of Arthur Lee Giles, the co-defendant of petitioner. In the sentence proceedings she testified that she had seen Arthur Lee Giles "killing" her mother with a knife.

During his cross examination of Brenda Nelson, trial counsel for petitioner impeached her by bringing to her attention the statements that she had made under oath at prior proceedings in this case. The prior testimony was the same as that now alleged as newly discovered namely that she had seen Arthur Lee Giles, not the petitioner, attacking her mother with a knife. Trial counsel successfully entered into the record portions of the preliminary hearing and of the petitioner's first trial in 1979, and successfully prevented the prosecution from entering the entire document. Brenda Nelson's inconsistent statement is not newly discovered but was known by petitioner's

counsel at time of trial and utilized by them to impeach the primary witness that the State produced. Nelson's restatement at Giles' 1991 hearing is identical to previous inconsistent statements and is cumulative to the facts known at the time of trial. Rule 32.1(e)(2) and Rule 32.1(e)(3).

Therefore, the 1991 statement of Brenda Nelson does not reveal any newly discovered material facts as contemplated by Rule 32.1. Additionally, the facts were known at trial and were presented to the court and jury during the cross-examination of Brenda Nelson and the jury rejected petitioner's defense that he did not stab or shoot anyone. These facts certainly would not have changed the outcome of the trial nor would have established that petitioner was innocent of the crime. This claim is without merit.

CONCLUSION

As found specifically in the beginning of this opinion, many of the allegations made by Jones are precluded and, therefore, do not entitle Jones to relief. As to the remaining claims before this Court, Jones has the burden of proving them to the satisfaction of this Court by a preponderance of the evidence. Rule 32.3. Based upon the evidence presented at the evidentiary hearing and after evidence including depositions and the record of Jones' trial, this Court finds that Jones has not met his burden of proving that he is entitled to relief. Jones is not entitled to a perfect trial, only a fair trial under constitutional principles. This Court is convinced that the conviction and sentence of death by electrocution are the result of a fair trial wherein the petitioner received all constitutional privileges to which he was entitled, including effective representation by counsel. It is therefore

ORDERED, ADJUDGED AND DECREED that the Rule 32 Petition of Aaron Jones is due to be and is hereby denied.

/S/ WILLIAM E. HEREFORD
William E. Hereford, Judge

COURT OF CRIMINAL APPEALS OF ALABAMA

CR-95-1967
April 30, 1999
Rehearing Denied July 16, 1999
Certiorari Denied December 17, 1999
Alabama Supreme Court 1981775

AARON LEE JONES

v.

STATE

Dewey Ballantine, Vincent R. Fitzpatrick, Jr., and Heather K. McDevitt, New York City, New York; and Stephen Clark Jackson, Birmingham, *for appellant*.

Bill Pryor, atty. gen., and Michael B. Billingsley, asst. atty. gen., *for appellee*.

FRY, Judge.

This case was originally assigned to another judge on the Alabama Court of Criminal Appeals. It was reassigned to me on February 15, 1999. Although I was not a member of this Court when this case was orally

argued, I have reviewed the recorded audiotapes and videotapes of the argument.

Aaron Lee Jones appeals from the denial of his petition for post-conviction relief filed pursuant to Rule 32, Ala.R.Crim.P, challenging his 1982 conviction for capital murder. Jones was originally convicted of murder made capital because two or more human beings were intentionally killed by one or a series of acts. He was sentenced to death in 1979. See § 13-11-2(a)(10) (now repealed). This court, however, reversed the trial court's judgment and ordered a new trial pursuant to *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), and *Ritter v. State*, 403 So.2d 154 (Ala.1981). See *Jones v. State*, 403 So.2d 1 (Ala.Cr.App.1981). Jones was retried, and on December 10, 1982, he was again convicted of capital murder and sentenced to death. After remanding Jones's case for the trial court to clarify whether it had found any mitigating circumstances and whether the aggravating circumstances outweighed the mitigating circumstances, this Court, on January 22, 1985, affirmed Jones's conviction and sentence of death. *Jones v. State*, 520 So.2d 543 (Ala.Cr.App.1984). The Alabama Supreme Court affirmed this court's judgment on January 8, 1988. *Ex parte Jones*, 520 So.2d 553 (Ala.1988). On October 3, 1988, the United States Supreme Court denied certiorari review. *Jones v. Alabama*, 488 U.S. 871, 109 S.Ct. 182, 102 L.Ed.2d 151 (1988). On March 6, 1990, Jones filed a Rule 32 petition attacking his conviction and sentence. On May 13, 1995, Jones supplemented his original petition with an amended petition. The trial court held an evidentiary hearing on the allegations in Jones's petition on November 13-14, 1995, and, in a thorough 30-page order, denied all relief on June 10, 1996.

The essential facts of this case were recited by this court in *Jones v. State,* supra:

> "Tony Nelson testified that on the morning of November 10, 1978, he was sleeping with his ten-year-old brother, Charlie, in one of the bedrooms of his parents' home in the Rosa community in rural Blount County, Alabama. His thirteen-year-old sister, Brenda, was sleeping with their parents, Willene and Carl Nelson, in another bedroom. Tony's grandmother was sleeping by herself in a third bedroom of the home.
>
> "At 3:27 a.m. Tony was awakened by a disturbance inside the home. When the light in his bedroom was turned on, he saw Arthur Lee Giles, a former employee of his father, standing in the doorway of Tony's bedroom. Tony's father appeared and asked Giles to leave. Tony got out of bed and followed Giles to make sure Giles left as directed. As Tony stepped out the back door of the home Giles shouted 'here,' and shot him twice, once in the neck and once in the chest. Giles, then, re-entered the Nelsons' home. Tony made an effort to go and get a gun, but was unable to do so due to his injuries. Instead, he crawled to, and hid under, his father's truck. Shortly, thereafter, he heard Giles and another man exit his parents' home. He saw the men only from the waist down. He heard one of them say that they needed to find Tony and that the other man should 'get the money.' After they left, Tony went back inside. In his parents' bedroom he found his mother, his father, his sister, and his brother. All four had been severely wounded and there was blood all over them. Charlie and Brenda responded when Tony asked if anyone was still alive. His par-

ents were dead. Tony rushed Brenda and Charlie to the hospital where all three, including Tony, were treated for their wounds.

"Charlie Nelson testified that he saw Giles when his father, Carl Nelson, asked Giles to leave the home. He saw Tony leave and heard two gunshots. Giles, then, reappeared and shot Charlie's grandmother, who was standing in the doorway to Charlie's bedroom. Giles proceeded to Charlie's parents' bedroom from where Charlie heard more gunshots. Charlie ran to his parents' bedroom, where he saw Giles and another man, whom he positively identified at trial as the appellant. He realized that his mother, his father and his sister had all been shot. He jumped on top of his sister to protect her from further harm. As he lay there, he saw the appellant stab his mother and father with a knife. His mother and father were both moaning as the appellant repeatedly stabbed them. The appellant turned and stabbed Charlie's sister Brenda, who had already been shot above one eye. Charlie was hit in the head several times, after which the appellant stabbed him twice in the back.

"On cross-examination Charlie admitted that during appellant's first trial Charlie had stated that Giles and the appellant appeared to be drunk. He also stated that Giles 'ordered the appellant around' and directed the appellant to stab his victims.

"Brenda Nelson confirmed those parts of Tony's and Charlie's testimony as to things she had witnessed. She identified the appellant at trial as the man she saw repeatedly stabbing her mother. She stated that Giles was the one that shot her, Brenda, in the head.

"Dr. Joseph Embry of the Alabama Department of Forensic Science testified that Willene Nelson died from multiple stab wounds that damaged her heart, lungs, and kidneys. Her body received 29 knife wounds (17 stab wounds and 12 slash wounds), numerous lacerations and abrasions about the head from a blunt instrument, and one gunshot wound to the left shoulder. Dr. Embry testified that Carl Nelson died from a combination of gunshot wounds and stab wounds. He was shot once through the heart and once in the left arm. He was stabbed, approximately, eight times, including a stab wound in the neck which severed his spinal cord. He also received numerous blunt instrument abrasions about the head. Dr. Embry testified that Carl Nelson was alive when he was stabbed in the neck.

"Billy Irvin, an investigator with the Blount County Sheriff's Department, testified that he interviewed the appellant at 8:15 a.m. on November 11, 1978. During this interrogation the appellant confessed to his participation in the events at the Nelsons' home the previous night. Appellant's confession was tape recorded and transcribed. The appellant reviewed the transcript of his confession and signed it, voluntarily. After the trial court conducted a hearing and determined that appellant's confession was, indeed, voluntary, Irvin was permitted to read it to the jury.

"In appellant's statement, he admitted participating in the activities that resulted in the deaths of Willene and Carl Nelson. According to the appellant, although they never found any money, he and Giles went to the Nelsons' home to rob Carl Nelson. Giles had told the appellant that Carl Nelson had not suf-

ficiently paid Giles for work Giles had done for Nelson in the past. Giles and the appellant had been drinking rum and beer prior to their trip to the Nelsons' home. They were both armed with .32 caliber pistols, but appellant's pistol would not fire at the Nelsons' home because he lost the firing pin. The appellant's statement confirmed the gruesome details of the attack on the Nelson family. He stated that by the time he entered the back bedroom, Giles had already shot and stabbed 'everyone.' In his own words the appellant stated:

> " 'I goes off in the other room where he [Giles] at . . . shot and stabbed them all there, you know, the kids and . . . he looks at me and tells me, you know, that I had to do something and I told him that I didn't have a knife so he gave me one and I cut the mother and another man and cut the boy and that's all I did.'
>
> "The appellant further stated that he used a butcher knife that Giles had, apparently, obtained from inside the Nelsons' home. He also said that the 'little girl' at one point begged him not to do it, and that the 'woman' moved right before he stabbed her. The appellant explained that when he stabbed the 'woman' he 'really was just so gone, I just closed my eyes' and stabbed wildly.
>
> "Although his confession was admitted into evidence, the appellant did not testify in his own behalf at trial, except during the suppression hearing on the issue of the voluntariness of his confession. In defense, he presented excerpts of the transcribed testimony, from his first trial, of several state's witnesses for

> impeachment purposes. He also presented his alleged accomplice, Arthur Lee Giles, who invoked his Fifth Amendment rights, and refused to testify. Appellant's theory in defense was that his participation in the double murder fell short of capital murder because Giles did all the actual killing and he, the appellant, only did what Giles instructed him to do.
>
> "The jury found the appellant "guilty as charged in the indictment" and the trial court, in accordance with the jury's recommendation, sentenced the appellant to death by electrocution."

520 So.2d at 545-46.

Initially, we note that on direct appeal all issues were scrutinized, including those issues reviewable only under the "plain error" doctrine. There is no plain error review in an appeal from the denial of a Rule 32 petition.

I.

Jones claims that the trial court erred in adopting the State's proposed findings of fact and conclusions of law in its order denying his Rule 32 petition. Jones specifically asserts that adopting the State's findings was error, because, he says, those findings ignored evidence, made questionable credibility choices, and provided no independent analysis by the trial court. We note that Jones's challenge of the trial court's order is general and provides no specific examples of incorrect findings or misinterpreted evidence.

> "While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts pro-

> posed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Hubbard v. State*, 584 So.2d 895 (Ala.Cr.App.1991); *Weeks v. State*, 568 So.2d 864 (Ala.Cr.App.1989), cert. denied, [498] U.S.[882], 111 S.Ct. 230, 112 L.Ed.2d 184 (1990); *Morrison v. State*, 551 So.2d 435 (Ala.Cr.App.), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990)."

Bell v. State, 593 So.2d 123, 126 (Ala.Cr.App.1991), cert. denied, 593 So.2d 123 (Ala.[Cr.App.]), cert. denied, 504 U.S. 991, 112 S.Ct. 2981, 119 L.Ed.2d 599 (1992).

Our review of the record supports the findings of the trial court's order. The findings and conclusions of the trial court, even if they were initially drafted by the State, present a fair and accurate statement and analysis of the evidence presented to the trial court.

Moreover, the record reflects that the trial court was thoroughly familiar with the case. After reviewing the record in this case, we find no reason to doubt that the trial court's order denying Jones's postconviction relief represents the trial court's independent judgment and its considered conclusions. Therefore, we find that the trial court's findings of fact and conclusions of law are supported by the evidence and are not clearly erroneous.

II.

In his petition, Jones presented numerous claims regarding the performance of his trial counsel, most alleging acts and omissions of his counsel during their preparation for trial and at trial, which, he said, violated his rights guaranteed by the laws and Constitution of

Alabama and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Jones claims that as a result of his trial counsel's errors he was denied effective assistance of counsel.

> "In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-pronged test articulated by the United States Supreme Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):
>
> > " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.'
>
> "466 U.S. at 687, 104 S.Ct. at 2064.
>
> > " 'The performance component outlined in *Strickland* is an objective one: that is, whether counsel's assistance, judged under "prevailing professional norms," was "reasonable considering all the circumstances." ' *Daniels v. State,* 650 So.2d 544, 552 (Ala.Cr.App.1994), cert. denied, 488 U.S. 1051, 109 S.Ct. 884, 102 L.Ed.2d 1007 (1995[1989]), quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2065. 'A court deciding an

> actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct.' *Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066.

"The claimant alleging ineffective assistance of counsel has the burden of showing that counsel's assistance was ineffective. *Ex parte Baldwin,* 456 So.2d 129 (Ala.1984), aff'd, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985). 'Once a petitioner has identified the specific acts or omissions that he alleges were not the result of reasonable professional judgment on counsel's part, the court must determine whether those acts or omissions fall "outside the wide range of professionally competent assistance." [*Strickland,*] 466 U.S. at 690, 104 S.Ct. at 2066.' *Daniels,* 650 So.2d at 552. When reviewing a claim of ineffective assistance of counsel, this court indulges a strong presumption that counsel's conduct was appropriate and reasonable. *Hallford v. State,* 629 So.2d 6 (Ala.Cr.App.1992), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994); *Luke v. State,* 484 So.2d 531 (Ala. Cr. App. 1985). 'This court must avoid using "hindsight" to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance.' *Hallford,* 629 So.2d at 9. See also, e.g., *Cartwright v. State,* 645 So.2d 326 (Ala.Cr.App.1994).

> " 'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and

> it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

"*Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065 (citations omitted). See *Ex parte Lawley,* 512 So.2d 1370, 1372 (Ala.1987).

> " 'Even if an attorney's performance is determined to be deficient, the petitioner is not entitled to relief unless he establishes that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." [*Strickland,*] 466 U.S. at 694, 104 S.Ct. at 2068.'

"*Daniels,* 650 So.2d at 552.

> " 'When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer-including an appellate court, to the extent it independently reweighs the evidence-would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'
>
> "*Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069, quoted in *Thompson v. State*, 615 So.2d 129, 132 (Ala.Cr.App.1992), cert. denied, 510 U.S. 976, 114 S.Ct. 467, 126 L.Ed.2d 418 (1993).
>
> "In a Rule 32 proceeding, the petitioner has 'the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.' Rule 32.3, Ala.R.Crim.P. See *Fortenberry v. State*, 659 So.2d 194 (Ala. Cr. App. 1994), cert. denied, 516 U.S. 846, 116 S.Ct. 137, 133 L.Ed.2d 84 (1995); *Wilson v. State*, 644 So.2d 1326 (Ala.Cr.App.1994); *Elliott v. State*, 601 So.2d 1118 (Ala.Cr.App.1992)."

Bui v. State, 717 So.2d 6, 12-13 (Ala.Cr.App.1997), cert. denied, 717 So.2d 6 (Ala.[Crim.App.]1998).

Moreover, "[a] finding of no plain error is one factor to consider when assessing the performance of counsel." *Fortenberry*, 659 So.2d 194, 200 (Ala.Cr.App.1994), quoting *Hallford*, 629 So.2d 6, 10 (Ala.Cr.App.1992).

Jones was represented at trial and on appeal by Jack G. Davis, now deceased, and George M. Boles. Boles testified at the evidentiary hearing. In his testimony, Boles indicated that he became involved in Jones's case a few days before Jones's trial at Davis's request. Boles was to try to negotiate a plea agreement with the State.

Boles testified that he did in fact negotiate a plea agreement in which the State agreed to recommend a sentence of life imprisonment without parole, if Jones pleaded guilty. According to Boles, Jones unequivocally rejected the State's offer and insisted that he was innocent. When Boles informed the trial court that Jones had rejected the plea agreement, the trial court appointed Boles as co-counsel and insisted that the trial commence. On appeal, Jones argues that the root of his ineffective-assistance-of-counsel claims is what he says are Boles's racist views. However, in light of the circumstances surrounding Boles's appointment as Jones's counsel, we believe many of the claims are the result of Boles's late appointment as counsel to this case. Additionally, we note that evidence of the adequacy of the investigation conducted before trial was sparse because it was conducted by Davis, who at the time of the hearing on the Rule 32 petition was deceased. Finally, it also appears from Jones's brief on appeal, the trial court's order, and the transcript of the hearing, that at the hearing Jones abandoned most of the claims in his petition. Consequently, we will address only those issues Jones raises on appeal.

A.

Jones contends that the trial court erred in finding that his trial counsel had prepared and presented a reasonable and coherent defense, based on their knowledge of the case. Specifically, he argues that the trial court "misapprehended the true nature of Mr. Jones's claim that counsel failed adequately to develop a reasonable defense theory." (Appellant's brief at p. 15.) At the Rule 32 hearing, an expert witness testified that based on his review of the medical records, it was his opinion that the

victims were dead when Jones stabbed them. Jones argues that his trial counsel should have investigated thoroughly the timing of the allegedly fatal blows inflicted by Giles and compared those Jones admitted inflicting in his statement. Jones further claims that evidence "(1) that before he inflicted any wounds both victims were already dead and (2) that [consequently] he did not and could not form the intent required for a conviction of capital murder" was available to his trial counsel at the time of his trial and could have been used to show that he did not kill two or more persons pursuant to one course of conduct and that he did not have the necessary intent to kill.

The trial court found as follows with regard to this claim:

> "Jack Davis participated in the first trial and was co-counsel to Mr. Roundtree. Having participated in the prior trial, Davis was intimately acquainted with all the facts, circumstances, and evidence necessary to adequately represent Jones in 1982. At trial in 1982, Davis and Boles presented a reasonable, coherent defense of Jones. It is evident from the record that Jones denied any involvement in the murders. Instead, he claimed that he was present but did not inflict any knife wounds or gunshot wounds to the victims. The State's case depended upon the statements of the Nelson children who were surviving victims, and the confession of Jones. Boles aggressively attacked the witnesses' versions of events. Counsel impeached Brenda Nelson with prior inconsistent statements that she had made. In fact, counsel had admitted prior inconsistent statements over the objections of the State and prevented the State from admitting into evidence the entirety of her statements. Counsel also vigorously opposed

the admission of Jones's confession during the hearing on their motion to suppress and during the testimony of the State's witnesses before the jury. Review of Mr. Davis's and Mr. Boles's examination of witnesses at trial confirms that both trial counsel were well prepared and were knowledgeable of all the facts and circumstances of the crime.

"Petitioner now, in [a] Rule 32 [petition], presents a different defense theory and strategy to this Court. That strategy and defense is that Jones was at the scene of the murder, was asked to enter the house after the co-defendant Giles had shot and stabbed the victims, and that Jones, at Giles's command, stabbed the victims. Although he stabbed the victims, petitioner now claims that evidence shows that Carl and Willene Nelson were deceased at the time he inflicted the wounds on their bodies; therefore, this is evidence of Jones's lack of intent to commit murder. The presentation of this new theory is no more than second-guessing trial counsel's performance after petitioner's conviction and adverse sentence when the defense at trial proved to be unsuccessful. This is the situation of which *Strickland* warned.

"Under the circumstances, and evaluating the conduct of counsel and their perspective at the time of the challenged conduct, it is clear, based upon the first trial and the statements of Jones during his sentencing in the first case (CR 27, 28, 30, 31), that Jones was denying that he inflicted any wounds whatsoever on the victims. It is clear from his statements to the trial court concerning his attorney that this was his plea and that he was dissatisfied with his attorney, Mr. Roundtree, for trying to present a

> mental health defense. The record also shows that petitioner alleged that his confession was only made because of promises made by the sheriff's department concerning bond and that the statement was not true but that he was coerced into making it. It would have been unreasonable for counsel to argue before the jury the alternative, contradictory theory that petitioner now presents before this Court.
>
> "Under the circumstances that existed at the time of trial, counsel could not have presented the defense not offered, and therefore was not ineffective for not developing the strategy concerning the timing of the fatal blows and the blows that petitioner now argues that he did inflict. Trial counsel had the benefit of hindsight from the first trial in which to prepare and try the 1982 case for petitioner. This Court, however, may not indulge in hindsight in its scrutiny of trial counsel's conduct."

(C.R. 1044-46.)

The trial court's findings, which are supported by the record, indicate that it understood Jones's defense at trial and that counsel, in light of their knowledge at the time of trial, presented a vigorous defense. As the trial court correctly noted, Jones's counsel had the benefit of Jones's 1979 trial, which led to a conviction and the imposition of a sentence of death, to assist in determining an appropriate defense to the evidence. Davis, one of Jones's counsel in the 1982 trial, represented Jones in the 1979 trial; therefore, he had knowledge of what defense tactics were effective based on the state's evidence, and what defenses, especially the one of nonparticipation raised in the 1979 trial, were not. Additionally, as the trial court found, Jones refused to engage in a plea bargain before the 1982 trial; that refusal indi-

cated that he was not admitting any participation in the murders. Because the proposed theory of lack of intent would require Jones to admit participation in the acts, the theory presented in his Rule 32 petition is incongruent with Jones's actions and defense at trial. We have reviewed the record of Jones's direct appeal and agree with the trial court that Jones's counsel did an adequate job in developing a defense based on Jones's assertions at the time of the trial and the facts and circumstances of the case.

Moreover, in light of the evidence presented at trial, Jones's trial counsel may have made a strategic decision to not focus on the issue whether the victims were dead prior to Jones's participation. The victims were stabbed numerous times; there was testimony that the victims either moaned or moved while Jones was stabbing them. If the testimony Jones contends should have been used at trial was used, Jones would have essentially admitted participation in the stabbings. Consequently, if the jury rejected the expert testimony that the victims were already dead when Jones stabbed them, the jury could only conclude that Jones killed the victims. Furthermore, the gravity of the eyewitness testimony that the victims lay groaning, which leads to the reasonable inference that the victims were alive before Jones stabbed them and while Jones was stabbing them, was an additional factor to consider in presenting such a defense.

Finally, we note that even if Jones did not inflict the fatal blows, he would still be guilty of capital murder as an accomplice. Based on the totality of the circumstances, we find that Jones has failed to establish prejudice and a reasonable probability that, but for trial counsel's actions in failing to present evidence that the victims were already dead before Jones's participation in the incident, the outcome of his trial would have been

different. "Strategic choices made after thorough investigation of relevant law and facts are virtually unchallengeable." *Ex parte Lawley,* 512 So.2d 1370, 1372 (Ala.1987). We will refrain from the use of hindsight in evaluating trial counsel's decisions. See *Hallford,* 629 So.2d at 9; and *State v. Tarver,* 629 So.2d 14, 21 (Ala.Cr.App.1993). See also *Cade v. State,* 629 So.2d 38, 42 (Ala.Cr.App.1993), cert. denied, 511 U.S. 1046, 114 S.Ct. 1579, 128 L.Ed.2d 221 (1994) (holding that "an attorney may reasonably decide to avoid presenting evidence [or a defense] that he believes will do more harm than good"). We agree with the trial court's ruling that Jones's counsel did not render ineffective assistance in this regard.

B.

Jones argues that his trial counsel rendered ineffective assistance in failing to object to the trial court's jury charge on accomplice liability, failing to object to an allegedly burden-shifting charge on malice, and failing to request jury charges on voluntary intoxication and on manslaughter.

In order to reach the merits of Jones's claims of ineffective assistance of counsel with regard to the jury instructions, we must first address the underlying substantive issues.

When this Court conducts a review of the trial court's oral charge to the jury we do not look at a single jury instruction in isolation, but we must consider the instruction in the context of the overall charge. Any questioned language must be given a reasonable construction. Additionally, if a portion of the trial court's charge is erroneous, " 'the entire . . . charge must be construed together to see if there was reversible error.' " *Travis v.*

State, [Ms. CR-92-958, April 19, 1997] ___ So.2d ___ (Ala. Cr. App. 1997), quoting *Kuenzel v. State*, 577 So.2d 474, 517 (Ala.Cr.App.1990), aff'd, 577 So.2d 531 (Ala.1991), cert. denied, 502 U.S. 886, 112 S.Ct. 242, 116 L.Ed.2d 197 (1991).

1. The trial court's charge on accomplice liability.

Jones argues that the trial court's instruction on accomplice liability was "clearly improper and erroneous because it failed to instruct the jury on the particularized intent to kill necessary to sustain a capital murder conviction." (Appellant's brief at pp. 20-21.)

The trial court instructed the jury as follows with regard to particularized intent and accomplice liability:

> "A person cannot be guilty of murder in the first degree under [§ 13-11-2(a)(10), Ala.Code 1975][1] unless all four of these elements are present. First, he has to intend to take human life when he does the act. Second, he has to kill willfully. Third, he has to kill deliberately and with premeditation. And four, he must kill with malice aforethought. If any one of these four elements is absent, he is not guilty of murder in the first degree as set out in the statute defining murder in the first degree. In addition to being convinced beyond a reasonable doubt and to a moral certainty that the defendant committed murder in the first degree, as I have defined to you, it would also be necessary for the State of Alabama to prove beyond a reasonable doubt and to a moral cer-

[1] Degrees of murder were eliminated when the current Death Penalty Statute was enacted, effective July 1, 1981. That statute applied only to conduct occurring after July 1, 1981. The murders Jones was charged with occurred in 1978.

tainty that at said time two or more human beings were intentionally killed by the defendant by one or a series of acts.

"So to find the defendant guilty as charged, you would also have to find from the evidence beyond a reasonable doubt and to a moral certainty that the defendant did by one or a series of acts intentionally kill two or more human beings. If after consideration of all the evidence in the case, you are convinced beyond a reasonable doubt and to a moral certainty that the defendant is guilty of murder in the first degree, as I have explained to you, and if you are further convinced beyond a reasonable doubt and to a moral certainty that the defendant did at the same time and occasion intentionally kill two or more human beings by one or a series of acts as charged in the indictment, then it would be your duty to find the defendant guilty as charged.

"Now, ladies and gentlemen, there has been some evidence offered in this case indicating that at the time and the place this alleged offense occurred there was more than one person who was present and participated in the act that was set out by the wording of the indictment. Under our law it is well established that when by pre-arrangement or on the spur of the moment two or more persons enter upon a common enterprise or a venture and a criminal offense is contemplated, each is a co-conspirator. And if the purpose was carried out, each is guilty of the offense committed whether he did any overt acts or not. This rests on the principle that one who is present, encouraging, aiding, abetting or assisting the other in the perpetration or commission of an offense is a guilty participant, and in the eye of the

> law is as equally guilty as the one who does the act. Such community of purpose or conspiracy need not be proved by positive testimony. The jury is to determine whether that exists and the extent of it from the conduct of the parties and all the testimony in the case.
>
> "When two or more persons enter upon an unlawful purpose with the common intent to aid and encourage each other in anything within their common design, they are each responsible for everything which was consequently and subsequently the result from such unlawful purpose whether specifically contemplated or not."

(C.R. 685-88; R. on dir. app. 395-98.)

The trial court's instruction that the jury find that Jones had the requisite intent immediately preceded its instruction on accomplice liability. When read together, and especially in light of the fact that the instruction on accomplice liability immediately followed the trial court's instruction on the necessity of finding a particularized intent to kill, we find no reversible error in the trial court's charge to the jury. We acknowledge that the portion of the trial court's instruction that states, "they are each responsible for everything which was consequently and subsequently the result from such unlawful purpose whether specifically contemplated or not" may be confusing and may appear prejudicial. However, we believe, in light of the concreteness of the trial court's instruction on the finding of particularized intent and in light of the evidence, argument, and instructions presented at trial, the jury, even if it convicted Jones based on the theory of accomplice liability, found that Jones possessed the necessary intent to kill. Therefore, the trial court's instructions on intent and accomplice liability

when given a reasonable construction in light of the facts adduced at trial did not constitute reversible error. *Davis v. State*, 740 So.2d 1115 (Ala.Cr.App.1998); *Roberts v. State*, 735 So.2d 1244 (Ala.Cr.App.1997); and *George v. State*, 717 So.2d 827 (Ala.Cr.App.1996), rev'd on other grounds, 717 So.2d 844 (Ala.1996).

Because we find no reversible error in the trial court's instruction to the jury on accomplice liability and particularized intent, we cannot conclude that Jones's trial counsel was ineffective for not challenging these instructions. Counsel cannot be ineffective for failing to raise nonmeritorious objections.

2. The trial court's charge on malice.

Jones contends that the trial court committed reversible error when it instructed the jury on the element of malice, because, he says, the instruction created a "mandatory presumption" that relieved the state of its burden of persuasion of the element of malice and shifted that burden to him.

The trial court instructed the jury as follows:

> "Now, we have [a] statute which defines murder in the first degree. This statute says that every willful, deliberate, malicious and premeditated killing of a human being is murder in the first degree. Now I will undertake to define these four terms for you in order that you may better understand them, and in doing so, will use the language used by the Supreme Court many years ago.
>
> "Willful means governed by the will without yielding to reason. Deliberate means formed with deliberation in contradistinction to a sudden and rash act. Malice means done with a fixed hate or wicked

intention or a motive, not the result of a sudden passion. That is the definition of actual malice. But the word malice, as used in this statute which defines murder, has a broader meaning than that. It includes, not only actual malice, but includes what we call legal or implied malice. And in the broader sense, it means the state or condition of the mind which prompted a person to do an unlawful act without legal justification or extenuation.

"Now every intentional and unlawful killing of a human being is presumed to be done with malice aforethought unless the circumstances that surround the killing rebut the idea of malice. Every intentional and unlawful killing of a human being with a deadly weapon, such as a pistol or with a knife, is presumed to be done with malice unless the evidence that proved the killing rebuts the presumption of malice."

(C.R. on Rule 32 683-685.)(R. on dir. app. 393-95.)

This court has written:

" 'Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime-that is, an "ultimate" or "elemental" fact-from the existence of one or more "evidentiary" or "basic" facts. *E.g., Barnes v. United States,* 412 U.S. 837, 843-844 [93 S.Ct. 2357, 2361-62, 37 L.Ed.2d 380] [(1973)]; *Tot v. United States,* 319 U.S. 463, 467 [63 S.Ct. 1241, 1244, 87 L.Ed. 1519] [(1968)]; *Mobile, Jackson & K.C.R. Co. v. Turnipseed,* 219 U.S. 35, 42 [31 S.Ct. 136, 137, 55 L.Ed. 78] [(1910)]. The value of these evidentiary devices, and their validity under the Due Process Clause, vary from case to case, however,

depending on the strength of the connection between the particular basic and elemental facts involved and on the degree to which the device curtails the factfinder's freedom to assess the evidence independently. Nonetheless, in criminal cases, the ultimate test of any device's constitutional validity in a given case remains constant: the device must not undermine the factfinder's responsibility at trial, based on evidence adduced by the State, to find the ultimate facts beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358, 364 [90 S.Ct. 1068, 1072, 25 L.Ed.2d 368] [(1970)]; *Mullaney v. Wilbur*, 421 U.S. [684,] at 702-703, n. 31 [95 S.Ct. 1881, 1891-92, n. 31, 44 L.Ed.2d 508] [(1975)].

" 'The most common evidentiary device is the entirely permissive inference or presumption, which allows—but does not require—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant. See, *e.g., Barnes v. United States*, supra, [412 U.S.], at 840 n. 3 [93 S.Ct. at 2360 n. 3]. . . . Because this permissive presumption leaves the trier of fact free to credit or reject the inference and does not shift the burden of proof, it affects the application of the "beyond a reasonable doubt" standard only if, under the facts of the case, there is no rational way the trier could make the connection permitted by the inference. For only in that situation is there any risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational factfinder to make an erroneous factual determination.

" 'A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only

the strength of the "no reasonable doubt" burden but also the placement of that burden; it tells the trier that he or they must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts. *E.g., Turner v. United States,* [396 U.S. 398,] 401-402, and n. 1 [90 S.Ct. 642, 644-45, 24 L.Ed.2d 610 (1970)]; *Leary v. United States,* 395 U.S. 6, 30 [89 S.Ct. 1532, 1545, 23 L.Ed.2d 57] [(1969)]; *United States v. Romano,* 382 U.S. 136, 137, and n. 4, 138, 143 [86 S.Ct. 279, 280, and n. 4, 280, 283, 15 L.Ed.2d 210] [(1965)]; *Tot v. United States,* supra [319 U.S.], at 469 [63 S.Ct. at 1245]. In this situation, the Court has generally examined the presumption on its face to determine the extent to which the basic and elemental facts coincide. *E.g., Turner v. United States,* supra [396 U.S.], at 408-418 [90 S.Ct. at 648-53]; *Leary v. United States,* supra [395 U.S.], at 45-52 [89 S.Ct. at 1552-57]; *United States v. Romano,* supra [382 U.S.], at 140-141 [86 S.Ct. at 281-82]; *Tot v. United States,* 319 U.S., at 468 [63 S.Ct., at 1245]. To the extent that the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts based on the presumption's accuracy in the run of cases. It is for this reason that the Court has held it irrelevant in analyzing a mandatory presumption, but not in analyzing a purely permissive one, that there is ample evidence in the record other than the presumption to support a conviction. *E.g., Turner v. United States,* 396 U.S., at 407 [90 S.Ct., at 647];

> *Leary v. United States,* 395 U.S., at 31-32 [89 S.Ct., at 1545-46]; *United States v. Romano,* 382 U.S. at 138-139 [86 S.Ct. at 280-81].'
>
> "*County Court of Ulster County, New York v. Allen,* 442 U.S. 140, 156-60, 99 S.Ct. 2213, 2224-26, 60 L.Ed.2d 777 (1979) (footnotes omitted, emphasis in original)."

Beard v. State, 612 So.2d 1335, 1342-43 (Ala. Cr. App. 1992). See also *Manuel v. State,* 711 So.2d 507 (Ala. Cr. App.1997).

Here, the predicate fact supporting the presumption is Jones's intentional and unlawful killings of the victims with a deadly weapon, i.e., a knife. The presumed fact that the jury was instructed to conclude from proof of the killings is that Jones committed the murders with malice aforethought. However, in order for the jurors to reach that conclusion, the State had to prove that Jones killed the victims intentionally and that the circumstances of the killings evidenced that Jones acted with malice aforethought. We do not find that the trial court's instruction shifted the State's burden to establish the element of malice to Jones. In this situation, the permissive presumption " '[did] not relieve the state of its burden of persuasion because the presumption still require[d] the state to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved.' " *Beard,* 612 So.2d at 1343, quoting *Francis v. Franklin,* 471 U.S. 307, 314, 105 S.Ct. 1965, 1971, 85 L.Ed.2d 344 (1985).

Therefore, we conclude that the instruction could not reasonably be read, as Jones suggests, as instructing the jury that it was required to infer or presume the element of malice aforethought in the absence of evidence from Jones presented evidence that such a presumption was

unwarranted. Consequently, we do not consider the trial court's instruction violative of the Due Process Clause of the Fourteenth Amendment, which "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). Because we do not believe that a reasonable juror could have interpreted this instruction as relieving the prosecution of its burden of persuasion on each essential element of the charged capital murder, we find no error. Moreover, the trial court also gave a charge concerning the defendant's presumption of innocence and the State's burden of proof. Therefore, when considering the jury instruction in its entirety, the error, if any, was cured by the additional charges. *Hubbard v. State,* 584 So.2d 895 (Ala. Cr. App. 1991), cert. denied, 502 U.S. 1041, 112 S.Ct. 896, 116 L.Ed.2d 798 (1992); *Sims v. State,* 386 So.2d 767 (Ala. Cr. App.1980) (holding that trial court's instruction on malice did not shift the State's burden of proof to the defendant).

Because Jones has failed to establish that the trial court's instruction on malice constituted error, he has failed to show that his trial counsel was ineffective for failing to challenge this instruction.

3. Trial counsel was ineffective for failing to request a jury instruction on the lesser included offense of manslaughter and on voluntary intoxication.

a. Failure to request a jury instruction on manslaughter.

"Generally, a trial court should instruct the jury on a lesser offense if there is a reasonable theory from

the evidence to support that lesser offense. *Ex parte Stork*, 475 So.2d 623, 625 (Ala.1985). However, a trial court may properly refuse to instruct on a lesser offense when it is 'clear to the judicial mind that there is no evidence tending to bring the offense within the definition of the lesser offense.' *Stork*, 475 So.2d at 625. In this case, the trial court did not err in refusing the appellant's requested instruction on the lesser offense of manslaughter.

> " 'For a jury to find that the appellant may have been guilty of manslaughter rather than murder, evidence would have had to have been introduced at trial which might have shown the appellant's conduct to have been "reckless" or triggered by "sufficient provocation." § 13A-6-3(a), Ala.Code 1975. If such evidence is introduced "however weak, insufficient, or doubtful in credibility," then the appellant is entitled to a jury charge on the lesser included offense. *Ex parte Stork*, 475 So.2d 623 (Ala.1985); *Anderson v. State*, 507 So.2d [580] at 583 [(Ala. Cr. App. 1987)].' "

Jones v. State, 656 So.2d 414, 415 (Ala.Cr.App.1994), quoting *Carey v. State*, 560 So.2d 1103, 1106 (Ala. Cr. App. 1989).

The evidence presented at trial did not support a jury instruction on manslaughter. This incident occurred during the early morning hours. Jones and his accomplice awakened a sleeping household. No evidence was presented that the victims had any weapons or that they provoked or attacked Jones, causing him to stab them multiple times. The evidence tended to show that after the victims had been shot by his accomplice, Jones stabbed the victims repeatedly, and that they were moan-

ing while he was stabbing them. Additionally, there was no evidence that Jones's conduct was reckless. Jones's theory of defense was that his participation in the murders fell short because his accomplice did the actual killing and he did only what his accomplice instructed him to do. This theory does not place the element of intent at issue. Such conduct under the facts in this case is consistent with intentional, not reckless conduct. Finally, by his conduct before his second trial and his unwillingness to enter a plea agreement, Jones was obviously denying any participation in the murders. He clearly did not believe that his mental state was an issue. Therefore, we find that the evidence did not support a charge of manslaughter.

b. Failure to request a jury instruction on voluntary intoxication.

Likewise, the evidence presented at trial failed to support a jury instruction on voluntary intoxication. Evidence was admitted in the form of Jones's statement to law enforcement officers in which he admitted that he and Giles had been drinking rum and beer before going to the victims's house; however, such an admission does not prove that he was intoxicated. *Windsor v. State*, 683 So.2d 1027 (Ala.Cr.App.1994), aff'd, 683 So.2d 1042 (Ala.1996), cert. denied, 520 U.S. 1171, 117 S.Ct. 1438, 137 L.Ed.2d 545 (1997). Additionally, although Charlie Nelson testified that Jones and his accomplice seemed "drunk" and although Jones admitted in his statement that he "was just so gone," when he stabbed the victims that he just closed his eyes and stabbed wildly, none of the evidence presented at trial indicated that he was so intoxicated that he could not form the requisite intent to sustain a conviction for murder. *Coon v. State*, 494 So.2d

184, 188 (Ala.Cr.App.1986); *Lawrence v. State*, 341 So.2d 188, 193 (Ala.Cr.App.1977)(holding "that voluntary drunkenness is not a defense to a criminal charge unless it is so extreme as to render impossible some mental condition which is an essential element of the criminal act"). The evidence here simply does not support such a charge.

At his Rule 32 hearing and on appeal, Jones contends that his trial counsel was ineffective for not presenting evidence that he was intoxicated at the time of the murders. Jones argues that the testimony of Glen Jones, his sister, would have established that he was intoxicated at the time of the murders. We agree with the trial court, however, that counsel made a strategic choice not to present this defense and not to call Glen Jones as a witness in the 1982 trial. Glen Jones testified during the 1979 trial. In her testimony she admitted that she allowed Jones to "shoot up" with drugs while her children were in her house. In addition to her character being challenged, her testimony was impeached and, consequently, led to the implication that Jones's accomplice did not have to coerce Jones to participate in the murders. As the trial court stated,

> "It is easy to see why counsel would be reluctant to call Glen Jones for the second trial after hearing her testimony from the first trial. . . . Since petitioner was convicted in his 1979 trial, trial counsel in the 1982 trial had good reason to avoid using Glen Jones as a witness. . . . In reviewing the testimony of Glen Jones, this Court is of the opinion that it was a sound strategic decision of trial counsel not to present Glen Jones as a witness at trial."

(C.R. 1059-60.) Jones's trial counsel had knowledge of the previous trial and of the effectiveness at that trial of

the testimony of various witnesses, especially the testimony of Glen Jones. Based on our review of the first trial, we cannot say that it was error for trial counsel not to present testimony from Glen Jones to establish Jones's intoxication, in light of the questionable credibility of her testimony in the previous trial. " '[I]f an attorney is aware of a line of defense and makes a conscious decision to reject it, rather than failing to raise it simply because he was aware that it existed, it is more likely that the failure to raise the defense was reasonable.' " *Cade v. State*, 629 So.2d at 41-42, quoting, *Gates v. Zant*, 863 F.2d 1492, 1498 (11th Cir.), cert. denied, 493 U.S. 945, 110 S.Ct. 353, 107 L.Ed.2d 340 (1989). Therefore, because trial counsel made a strategic choice not to present an intoxication defense, we do not conclude that Jones's trial counsel was ineffective for not presenting evidence of his voluntary intoxication, nor do we find error in their failure to request a charge on voluntary intoxication-the evidence simply did not support it.

Based on the foregoing, Jones's trial counsel was not ineffective for failing to request jury instructions on manslaughter and on voluntary intoxication. Those instructions were not supported by the evidence and the theory of the defense.

III.

Jones contends that his trial counsel rendered ineffective assistance during the sentencing phase of his trial because, he says, his counsel failed to investigate and to present available mitigating evidence. Specifically, he maintains that his trial counsel could have provided testimony concerning his mental health, evidence that he did not deliver the fatal blows to the victims, and testi-

mony from family members and friends about his background that would have been useful as mitigation. At Jones's trial the only evidence presented by the defense during the sentencing phase was Jones's testimony in his own behalf about a prior conviction.

While counsel has a duty to investigate in an attempt to locate evidence favorable to the defendant, "this duty only requires a *reasonable* investigation." *Singleton v. Thigpen,* 847 F.2d 668, 669 (11th Cir.(Ala.) 1988), cert. denied, 488 U.S. 1019, 109 S.Ct. 822, 102 L.Ed.2d 812 (1989) (emphasis added). See *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066; *Morrison v. State,* 551 So.2d 435 (Ala.Cr.App.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990). Counsel's obligation is to conduct a "substantial investigation into each of the *plausible* lines of defense." *Strickland,* 466 U.S. at 681, 104 S.Ct. at 2061 (emphasis added). "A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made." *Id.,* 466 U.S. at 686, 104 S.Ct. at 2063.

> "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information."

Id., 466 U.S. at 691, 104 S.Ct. at 2066.

On appeal Jones argues that the trial court erred in rejecting the following mitigating evidence, which he presented at his Rule 32 hearing, in support of his alle-

gations that counsel was ineffective for not presenting this evidence at his trial.

1. Evidence that Jones was and is severely mentally ill.

Jones claims that his trial counsel was ineffective for failing to present mitigating evidence that he was and is mentally ill, that he suffers from organic brain damage, that he is a dependent personality and easily coerced, that he suffered from multi-substance abuse and experienced "toxic psychosis" on the night of the murders, and that he suffers from dysthymia, anti-social personality disorder, and borderline mental functioning.

With regard to this claim, the trial court entered the following findings of fact:

> "At the evidentiary hearing, Petitioner presented the testimony of Dr. Brad Fisher, an expert in clinical forensic psychology. (Evidentiary hearing R. 284). Dr. Fisher testified that petitioner suffered at the time of the crime and continues to suffer from significant mental conditions. These mental conditions are (1) dependency and suggestibility, (2) multi-substance abuse, (3) organic impairment, and (4) major thought disorder. (Evidentiary Hearing R. 293-294). In forming his opinion, Dr. Fisher reviewed medical records, prison records, affidavits of family members, prior court records and [conducted] an evaluation of the petitioner. Additionally, he interviewed the family members. The evaluation of petitioner was conducted during a seven-to eight-hour period on November 30 and December 1 of 1994. On November 30, 1994, he interviewed petitioner's mother, Maritha Erby and interviewed other family

members on the 12th of November 1995, the Sunday before the evidentiary hearing in this matter. That interview included interviews with petitioner's mother; with his sister, Glen Jones; his brother, Henry Erby; his sister, Phyllis Faevers; his uncle, Johnny Wright; and his niece, Barbara Jones. (Evidentiary Hearing R. 289-290).

"The prison record consisted of depositions from Dr. Thomas L. Smith and Dr. James C. Thompson in 1979, including the 1979 evaluation by Drs. Thompson and Smith done at Bryce Hospital and the medical records from petitioner's stay in prison.

"The record reflects that counsel for petitioner investigated and pursued a mental health defense for the first trial. Petitioner had been evaluated by the Lunacy Commission. Previous counsel, during the first trial, had filed appropriate motions for mental evaluations and had conducted depositions of the mental health experts who evaluated petitioner. The trial court subsequently denied the motion for private psychiatric examination and testing and funds for an expert witness in the field of mental health to perform intelligence and personality tests on the petitioner. (C.R. 204-205). Thereafter, petitioner was granted his right to refile his motion for psychiatric examination and said motion was granted. (C.R. 106).

"Subsequently, in preparation for the second trial, Jack Davis filed a motion for expert witnesses including mental health experts and filed a motion for private psychiatric examination and testing. (CR. 204-205). That was denied by the Court on December 7, 1982. (CR. 205). This Court finds that counsel in the 1982 trial filed the appropriate

motions requesting mental health experts and the appropriate evaluations and tests to be performed upon petitioner and was denied relief by the Court. Petitioner claims that Davis and Boles did not adequately present the testimony available to them as to the mental health of the petitioner and had they presented the available information, they would have been allowed to present the testimony before the jury.

"This Court, after having reviewed the records that were reviewed by Dr. Fisher, the testimony of witnesses and the depositions submitted by both parties of the prison physicians that treated the petitioner, finds that the basis for Dr. Fisher's opinion is questionable.

"The first area of doubt is the diagnosis of psychosis. It appears that the original diagnosis was made by Dr. Richard Cooksey, a general practitioner for inmates in the prison system. On October 17, 1991, he examined the petitioner for weight loss. Petitioner had a weight-loss problem and Dr. Cooksey, not finding a physical reason for the problem, doubted an organic basis for weight loss and felt that the weight loss was a result of the petitioner just not eating. Petitioner told him that he would not eat anything on his tray if the tray came in contact with anything "unclean." Although in his records he wrote that petitioner admitted auditory hallucinations, the doctor admitted that they were poorly described at the time. (Page 21, Deposition of Dr. Cooksey). The doctor could remember nothing about the nature of the hallucinations. Admitting that he was not a psychiatrist, the doctor stated, 'If he is not eating, he's psychotic. That's pretty much

normal day-to-day functioning, eating.' (Page 22, Deposition Dr. Cooksey). When asked what percentage of inmates whom he saw at Donaldson Correctional Facility did he believe to be psychotic, he stated that it was common enough where it doesn't really stand out at that institution, inferring that he believed many of the inmates he saw were psychotic. (Pages 24-25, Deposition Dr. Cooksey). He made notes reflecting his diagnosis of petitioner in the medical records of petitioner and recommended that petitioner would be best served at Kilby Correctional Institution where he would get treatment for his mental [illness].

"Two psychiatrists treated the petitioner during his stay in prison, Dr. Blankenship and Dr. Joseph. From their depositions and from the record it appears that these doctors did not perform any individualized testing or evaluations of petitioner. Most examinations were routine and consisted of asking a series of form questions to which the petitioner would answer. The interviews were short, usually about eight minutes in length. They read the 'diagnosis' of Dr. Cooksey and treated petitioner for psychosis by giving him Haldol for his reported hallucinations. These doctors also could not describe specific hallucinations. Therefore, even though the medical records indicate some sort of mental health history, including earlier records of the Lunacy Commission, this Court concludes that there has been no reasonable dependable diagnosis of psychosis to support the opinion of Dr. Fisher, and indeed it appears to this Court that there is no evidence of psychosis.

"Although Dr. Fisher states that his testing showed that there is some organicity in the psychosis and other mental problems of the petitioner, there is no evidence to support this opinion. Dr. Fisher admitted that he could not obtain closure on this issue. This Court notes that it allowed the petitioner to be tested for any organic basis for mental health problems. Petitioner was transported to a facility which could perform the tests, but no test results or testimony was presented to this Court as to the result of those tests. Therefore, this Court concludes that there is no evidence of an organic basis for any mental health problems the petitioner might have.

"The diagnosis of low intelligence is rebutted by testimony of family members who stated the petitioner did well in school and no evidence was presented to contradict that. Although the petitioner quit school before he graduated, he did later obtain his GED, which rebuts any evidence of low intelligence to the point where it would have an effeet on the outcome of his trial or sentencing.

"Dr. Fisher testified that the petitioner was dependent and easily led by outside influences because of his upbringing, and that he was unable to make independent decisions. The basis of this opinion was the testimony of family members. Dr. Fisher's opinion was that with extensive and consistent abuse and abandonment as a child, one is more likely than a child who has not been consistently abused and abandoned to develop major psychological problems. (Evidentiary Hearing R. 308). There is no doubt that petitioner lived with different relatives and that there was some physical abuse but the evidence of physical abuse is negligible.

"Petitioner's sister, Glen Jones, testified to abuse by their father. She testified that her father was rarely around but when he did come that he would make petitioner and Glen take off their clothes, would tie them to a door knob and beat them with a cord. She testified that the beatings with a cord were so severe that wire from the extension cord was embedded in their flesh. The Court concludes that this is an exaggeration and that had this abuse occurred there would be some obvious scarring from where such young children were beaten to the point where the insulation of an extension cord was torn off and wire was embedded in their skin. The other evidence of abuse is negligible.

"The opinion of Dr. Fisher as to the effects upon petitioner of this 'abusive childhood' is rebutted by other family members that testified, including Glen Jones. Their testimony suggests that, although petitioner had to live with relatives and was beaten by his father and had other problems with family members, he adjusted well. Petitioner made good grades in school and had no trouble with teachers. He was helpful to people and was polite and well behaved. He was able to maintain employment and although he had a few problems with attendance, was generally considered to be a good worker. Petitioner attended church and played in the school band. He was not a violent person growing up.

"Mr. Wright, Jones's uncle, testified that petitioner was capable of making his own decisions but that he basically followed his friends. When asked if the problems that petitioner faced growing up in the neighborhood and the pressures from his friends who used drugs were not the normal pressures that

anyone faced growing up where Jones did, Wright answered 'Yes.' (Evidentiary Hearing R. 224). He followed his friends who were into drugs because they were his childhood friends and although some of them were not into drugs, some were. He followed the example of people who did not get into trouble but, '[i]t just happened that he was with the ones that had got into trouble.' (Evidentiary Hearing R. 245).

"This Court agrees that the pressures that petitioner was under in his neighborhood and in his upbringing were pressures normally faced by individuals in his situation, and, therefore, do not exhibit any individual, unique tendency in the personality of petitioner to follow the wrong example.

"All the testimony as to drug use reflects that the drug use was voluntary and there was no evidence of organic effects of his long-term drug use. Voluntary drug use has never excused or mitigated a crime of this nature in the State of Alabama nor does it in this case.

"After considering the testimony of Dr. Fisher and examining the basis from which he formed his opinion, this Court is of the opinion that there is no credible evidence of significant mental health problems in petitioner."

(C.R. 1050-55.)

The record supports the trial court's findings. We agree with the trial court that the evidence presented by Jones in support of this claim, including the testimony of Dr. Fisher and the depositions and affidavit of other expert witnesses, was not adequate evidence of a mitigating circumstance and was refuted by other testimony

and evidence admitted at the hearing and at trial. It is particularly significant that although Jones was provided with the opportunity and was even transported to a proper facility to be tested to determine an organic basis for the alleged mental health problems before his Rule 32 hearing, he admitted no test results but relied solely on opinion evidence to establish his alleged mental health problems. Additionally, we find significant the finding of the Lunacy Commission, which conducted an evaluation before Jones's trial that was relied upon heavily by his Rule 32 witnesses, that Jones was not suffering from a mental illness at the time of the acts charged that would have prevented him from distinguishing right from wrong or that would have prevented him from adhering to what was right. In this situation, the trial court made certain credibility determinations which are within its discretion. *Brownlee v. State,* 666 So.2d 91 (Ala.Cr.App.1995). We concur with the trial court's finding that Jones has failed to establish concrete evidence to support the suggestion that he was under extreme mental and emotional stress during the murders. See § 13A-5-51, Ala.Code 1975. Consequently, Jones has failed to meet his burden of proof to establish a claim of relief in this regard. See Rule 32.3, Ala.R.Crim.P.

2. Evidence that Jones did not kill the victims.

At the Rule 32 hearing, Jones presented testimony from Dr. Bryan Frist, a forensic pathologist, to support this claim. Dr. Frist testified that based on his review of the crime scene photographs, his examination of the victims' autopsy reports, and his review of the trial transcript, he believed that the victims died as a result of the actions of Jones's accomplice, which occurred prior to Jones's involvement in the incident. The state admitted

into evidence the deposition of Dr. Joseph Embry, the certified forensic pathologist who conducted the autopsy on the victims, to refute this conclusion. We find that the trial court findings provide a thorough, accurate assessment of the testimony and evidence to be considered with regard to this claim:

> "As to Willene Nelson, there was testimony at trial from Charlie Nelson, one of the children, and also a surviving victim, that he heard his mother moaning before she was stabbed by Jones. Dr. Frist attempted to give an explanation for the moaning as simply fluids building up in the lungs and that said noises were not unusual. It is the Court's opinion that this is not a reasonable explanation for the moaning of the victim. The Court therefore finds that the evidence shows that Willene Nelson was indeed alive and moaning before she was stabbed by Aaron Jones. When asked the basis of his assumption that the first person that started stabbing Willene was the one who inflicted the fatal wounds, Dr. Frist stated that with all the defensive wounds and all the stab wounds on her, there would be a lot of blood around because she would have continued struggling until she died and that was not the case with the murder scene. When asked if she could have fainted or otherwise passed out before she received the fatal wound, Frist agreed, but stated that he would have to have an explanation of why Willene passed out. He stated there were no blows significant enough to cause her to pass out.
>
> "There is significant evidence that Willene Nelson was pistol-whipped before she was killed. Dr. Embry's autopsy report is specific and described numerous injuries to her head, and concluded that

the instrument that made those injuries created patterns that matched the grip of a pistol. There was testimony from witnesses at trial that she was being beaten as well. Essentially, Dr. Frist's opinion is based upon his experience with facts of other cases and not with the medical evidence available [in this case]. Dr. Frist stated the following:

> " 'I have done cases where we know the perpetrator goes into a residence. He does the murder or the act and then goes outside and tells his cohort "You have to do something," to tie him in and make him part of the crime. I believe that is what happened here. (Evidentiary Hearing R. 87-A).'

"Therefore, his opinion goes outside his medical expertise and involves interpreting within a theory developed from the facts of other cases.

"Dr. Embry in his deposition on March 8, 1996, defended his opinions that he testified to in 1982 and the autopsies that he performed on Carl and Willene Nelson. Dr. Frist stated that death to Carl Nelson from the gunshot wound to his heart was instantaneous and that any further wounds would have been post-mortem. Dr. Embry stated simply that the amount of blood he found in the cranial cavity was such an amount to show that there was blood pressure after Carl Nelson was shot through the heart. The blood was the result of the knife wound that he had previously testified would have been fatal and was delivered before death. Dr. Embry stated that a wound to the heart with a low caliber handgun, either .22 or .32, would not necessarily cause instantaneous death and that the heart would continue to beat for several minutes. He tes-

> tified that Carl Nelson's wound was such a wound and that the heart continued to beat and that such was evident by the hemorrhaging around the knife wound. As the caliber of the bullet increases, the damage to the heart is more severe and a large caliber bullet would cause, in most cases, instantaneous death. That was not the case in the death of Carl Nelson."

(C.R. 1056-57.)

We find no abuse of discretion in the trial court's finding that Dr. Embry's testimony was more credible than Dr. Frist's, and its subsequent finding that Dr. Frist's testimony would not have been considered mitigating by the jury or by the court. *Brownlee,* supra. Additionally, we concur with the trial court's observation that "this crime was so savage and brutal that participation in any way by the petitioner would have weighed conclusively against mitigating his involvement on the basis of who was the particular individual who delivered the fatal blows to the victims." (C.R. 1058.) Therefore, we find no error in the trial court's determination that no mitigating circumstance existed in this regard.

3. Evidence about Jones's background from family members and friends.

At the Rule 32 hearing eight of Jones's family members testified that they were never contacted by Jones's trial counsel to testify about Jones's family background. Additionally, Jones presented expert testimony from Dan Turberville, an attorney who had tried at least 40 capital cases, that at a minimum trial counsel should have contacted and interviewed members of Jones's family and

investigated Jones's background. The trial court provided the following assessment of this testimony:

> "The mitigating evidence presented by the petitioner shows no more than a child of a broken family that had positive and negative influences in his life but chose to follow the friends that he grew up with that were taking drugs. From the testimony of these witnesses it is apparent that petitioner had the ability to do well in school, had people in whom he could confide and by whom he could be advised, was involved in church activities such as choir and other extracurricular activities such as playing in the school band. The petitioner's temperament was peaceful and the only negative influence appears to be the influence of his friends who used drugs.
>
> "Aaron Jones had the abilities and the opportunities to make the choices that everyone has to make in life and made the incorrect choice. When Aaron Jones started using drugs his life changed. His mitigation is that the drugs made him commit the crime. Frequently this has been interposed as a defense and as mitigation but it has never been accepted as an excuse to mitigate this type of crime.
>
> "The testimony of these witnesses is unconvincing. Had it been presented to the jury it would not establish mitigation for the acts of the petitioner."

(C.R. 1062.)

We have reviewed the testimony of Jones's family members and friends; none of their testimony supported a finding of a mitigating circumstance recognized by § 13A-5-51, Ala.Code 1975, and would not have changed the balance of the mitigating and aggravating circumstances in Jones's case. Therefore, we find no

error in the trial court's determination that the evidence would not have changed the outcome of Jones's trial.

Moreover, because we have determined that evidence of Jones's alleged mental illness, the forensic evidence, and the testimony of family and friends would not have established a mitigating circumstance, we cannot hold that Jones's trial counsel was ineffective for failing to present this evidence. We note that there is nothing in the record to suggest that Jones's trial counsel ignored matters that should reasonably have alerted them to Jones's mental health or to the value of contacting persons who might have information about Jones's background that might aid in his defense. See *Cochran v. State*, 548 So.2d 1062 (Ala.Cr.App.), cert. denied, 493 U.S. 900, 110 S.Ct. 259, 107 L.Ed.2d 208 (1989). Jones has not proven by a preponderance of the evidence that his attorneys were ineffective because they failed to investigate and present possible mitigating evidence. *Fortenberry*, 659 So.2d at 200. "In a challenge to the imposition of a death sentence, the prejudice prong of the *Strickland* inquiry focuses on whether 'the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " *Stevens v. Zant*, 968 F.2d 1076, 1081 (11th Cir.1992), cert. denied, 507 U.S. 929, 113 S.Ct. 1306, 122 L.Ed.2d 695 (1993), quoted in *Daniels*, 650 So.2d at 568. Jones has not established a reasonable probability that but for his counsel's failure to call these witnesses and present the alleged mitigating evidence during the sentencing phase of his trial that the outcome of the sentencing proceeding would have been different.

> "Further, we cannot say that the appellant suffered any prejudice based on counsel's performance because he failed to demonstrate any evidence of mitigation. Prejudice cannot merely be alleged; it

> must be affirmatively proved. *Duren v. State*, 590 So.2d 360 (Ala.Cr.App.1990). Thus, the appellant has not shown that there is a reasonable probability that the outcome of this trial would have been different, but for trial counsel's performance. *Baldwin [v. State*, 539 So.2d 1103 (Ala.Crim.App.1988)*]*, *Thompson v. State*, 581 So.2d 1216 (Ala. Cr. App. 1991), cert. denied, 502 U.S. 1030, 112 S.Ct. 868, 116 L.Ed.2d 774 (1992)."

Brooks v. State, 695 So.2d 176, 182 (Ala.Cr.App.1996), aff'd, 695 So.2d 184 (Ala.1997), cert. denied, 522 U.S. 893, 118 S.Ct. 233, 139 L.Ed.2d 164 (1997). See also *Waters v. Thomas*, 46 F.3d 1506, 1511 (11th Cir.), cert. denied, 516 U.S. 856, 116 S.Ct. 160, 133 L.Ed.2d 103 (1995)("our decisions teach that whether counsel's performance is constitutionally deficient depends upon the totality of the circumstances viewed through a lens shaped by the rules and presumptions set down in *Strickland v. Washington*, and its progeny"); and *Singleton*, supra (petitioner made no showing of prejudice resulting from alleged inadequate investigation by trial counsel where petitioner failed to proffer the type of mitigating evidence that would have changed outcome of trial had trial counsel conducted further investigation). Because Jones has not shown that any additional evidence would have changed the trial court's decision regarding sentencing, we agree with the trial court's ruling that trial counsel did not render ineffective assistance with regard to the investigation and presentation of mitigating evidence during the sentencing phase of Jones's trial. *Davis v. State*, 720 So.2d 1006 (Ala.Cr.App.1998), cert. denied, 525 U.S. 1149, 119 S.Ct. 1049, 143 L.Ed.2d 55 (1999).

Jones claims that his trial counsel provided ineffective assistance of counsel during the guilt phase and the sen-

tencing pha[illegible]f his trial. He alleges the following as instances of ineffective assistance of counsel:

1. His attorneys failed to adequately seek and present evidence in support of a change of venue.

2. His attorneys failed to adequately investigate and research the racial composition of Blount County and the representation by race and other cognizable groups on the grand jury, the jury pool, the jury venire, and the trial and sentencing jury panel.

3. His attorneys failed to conduct an adequate voir dire examination of potential jury members so as to identify those jurors who would, based on a conviction, automatically sentence Jones to death in violation of his constitutionally protected rights.

4. His attorneys failed to adequately investigate and attack the violations of his Fifth and Sixth Amendment rights in connection with the State's obtaining and using at trial an allegedly unconstitutionally obtained statement by Jones.

5. His attorneys failed to adequately preserve the record by failing to have several bench conferences transcribed.

6. His attorneys failed to investigate and to adequately cross-examine state witnesses whose testimony had to be challenged to protect his rights.

7. His attorneys failed to object to the prosecutor's arguments at both the guilt and sentencing stages.

8. His attorneys failed to prepare for or to defend against any of the aggravating circumstances offered

and relied upon by the State in the sentencing phase of his trial.

9. His attorneys failed to object to the prosecutor's comments on victim and family member impact.

10. His attorneys failed to adequately challenge the systematic underrepresentation of blacks, women, and other cognizable groups in the jury pool from which Jones's grand and petit jury were selected.

11. His attorneys failed to investigate the crime scene in order to determine if there was any exculpatory evidence.

12. His attorneys failed to "seek appropriate expert assistance for the pretrial, trial, and sentencing proceedings."

13. His attorneys failed to seek funds to retain a private investigator who could have supplied information on Arthur Lee Giles.

14. His attorneys were ineffective in that they requested defense funds for experts in the presence of the prosecution, thereby improperly revealing defense strategy.

15. His attorneys were ineffective because they failed to seek to voir dire the veniremembers individually, rather than in panels of 10.

16. His attorneys failed to note for the record the race of the veniremembers struck from Jones's jury.

17. His attorneys improperly waived Jones's right to a sequestered jury by withdrawing their motion for a sequestered jury.

18. His attorneys failed to object to what Jones says were improper and prejudicial jury verdict forms.

19. His attorneys failed to make a number of critical pretrial motions and trial motions.

20. His attorneys failed to request that the members of the jury be polled after the jury rendered its verdict.

21. His attorneys failed to present effective arguments before the sentencing court on why Jones's life should be spared.

22. His attorneys failed to object to the admission of an allegedly prejudicial presentence report that included inadmissible hearsay.

23. His attorneys failed to object to electrocution as cruel and unusual punishment.

24. His attorneys failed to make use of any jury questionnaires.

25. His attorneys "prejudiced [Jones] by informing the Court that the state had offered [Jones] a plea bargain."

Although the burden of pleading and proof as to these arguments was on Jones, see Rule 32.3, Ala.R.Crim.P., he presented no evidence at the hearing to support his argument that his counsel's performance with regard to these claims fell "outside the wide range of professionally competent assistance." *Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066. He failed to satisfy the burden-of-proof requirements of Rule 32.3. Furthermore, Jones presented no evidence to show how he was prejudiced by these alleged instances of ineffective assistance. *McNair*

v. State, 706 So.2d 828 (Ala.Cr.App.1997), cert. denied, 523 U.S. 1064, 118 S.Ct. 1396, 140 L.Ed.2d 654 (1998). As this court observed in *Stringfellow v. State,* 485 So.2d 1238, 1243 (Ala.Cr.App.1986), " '[e]ffectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made.' "

Finally, we note that in his petition Jones claims that his counsel was ineffective for "failing to include in a motion for a new trial each and every constitutional violation enumerated" in his petition. Jones, however, abandons this claim on appeal.' " "[A]llegations . . . not expressly argued on . . . appeal . . . are deemed by us to be abandoned." *United States v. Burroughs,* 650 F.2d 595, 598 (5th Cir.), cert. denied, 454 U.S. 1037, 102 S.Ct. 580, 70 L.Ed.2d 483 (1981).' " *Brownlee v. State,* 666 So.2d at 93, quoting *Burks v. State,* 600 So.2d 374, 380 (Ala.Cr.App.1991). In an exercise of diligence, however, we have reviewed each and every allegation of ineffective assistance of counsel and have found either that the allegation is without merit or that Jones failed to prove it. We have also considered the collective effect of all of the alleged errors and still find no error or violation of Jones's rights.

After reviewing the overwhelming evidence against Jones, including his confession, we believe that while his trial counsel may have made certain strategic choices that Jones now challenges, counsel did not render ineffective assistance. An accused is entitled " 'not [to] errorless counsel, and not [to] counsel judged ineffective by hindsight, but [to] counsel reasonably likely to render and rendering reasonably effective assistance.' " *Thompson v. State,* 615 So.2d 129, 134 (Ala.Cr.App.1992), cert. denied, 510 U.S. 976, 114 S.Ct. 467, 126 L.Ed.2d 418 (1993), quoting *Haggard v. Alabama,* 550 F.2d 1019,

1022 (5th Cir.1977). We find no merit to any of Jones's allegations of ineffective assistance of counsel. Jones has not shown "by a preponderance of the evidence the facts necessary to entitle [him] to relief" on any issue concerning the ineffectiveness of his trial counsel. Rule 32.3, Ala.R.Crim.P.

IV.

Jones contends that his appellate counsel, who was the same counsel who represented him at trial, rendered ineffective assistance. Jones claims that his appellate counsel failed to "recognize at least some of the real grounds for an effective appeal." (Appellant's brief at p. 43.) Specifically, he argues that his appellate counsel should have raised the following issues:

> 1. The failure to give a jury charge on intoxication and on the lesser included offense of manslaughter;
>
> 2. The trial court's omission of the required particularized intent instruction; and
>
> 3. The trial court's erroneous burden-shifting instruction.

However, because we have addressed these issues in light of Jones's claim of ineffective assistance of trial counsel and found that they did not constitute reversible error, Jones's appellate counsel cannot be held to be ineffective for failing to argue these issues on appeal. Moreover, at the conclusion of our affirmance of Jones's direct appeal, we stated: "In accordance with Rule 45A, Ala.R.App.P., we have carefully reviewed the record for any errors which would have adversely affected the rights of the appellant and found none." *Jones v. State,*

520 So.2d at 549. While we acknowledge that Jones's appellate counsel may have made decisions that Jones now questions, we do not find that Jones's appellate counsel was ineffective.

V.

Jones contends that his rights to a fair trial by an impartial jury, to the free exercise of peremptory challenges, and to due process were violated by the alleged misconduct of juror J.M. Specifically, Jones argues when the jurors were asked whether they knew any of the witnesses or if they knew anything about the facts of this case, J.M. failed to disclose that he knew Sheriff J.C. Carr and the various deputies who testified at trial, that he had worked for the victims, and that he had been inside the victims' residence.

At the outset, we note that Jones has satisfied his burden of proving that the alleged improper conduct by J.M. constitutes newly discovered evidence; the alleged misconduct was not known at the time of trial or at the time of direct appeal. *State v. Freeman,* 605 So.2d 1258 (Ala.Cr.App.1992) (holding that the jury foreman's failure to answer truthfully was newly discovered evidence in a capital murder case and the defendant's claim that her right to a fair trial was violated was not procedurally barred for defendant's failure to raise issue on direct appeal where information was not known at time of trial or at time of direct appeal).

To determine whether a defendant was prejudiced by a juror's failure to respond truthfully to a question during voir dire examination, the test is whether the defendant actually was prejudiced. *Knight v. State,* 710 So.2d 511 (Ala.Cr.App.1997). See *Dawson v. State,* 710 So.2d 472 (Ala.1997). To assist in the determination of preju-

dice, the following factors have been considered pertinent:

> " ' "[the] temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about." ' "

Tomlin, 695 So.2d at 170, quoting *Johnson v. State,* 536 So.2d 957, 958 (Ala.Cr.App.1987), cert. denied, 490 U.S. 1046, 109 S.Ct. 1955, 104 L.Ed.2d 424 (1989). " 'Thus, the facts in each case must be considered individually and much will remain in the discretion of the trial judge.' " *Tomlin,* 695 So.2d at 170, quoting *Parish v. State,* 480 So.2d 29, 30 (Ala.Cr.App.1985).

In light of the foregoing caselaw, we will now address Jones's allegations of juror misconduct separately.

1. Juror J.M.'s association with various witnesses.

Jones's counsel asked the following question during voir dire examination of the jury venire:

> "Do any of you know J.C. Carr? Everyone in the county knows J.C. Carr-72% of you voted for him and kept him in office for six terms. My question would be with respect if you know him on a personal basis-member of the same church, or social organizations that you felt it would affect the way you receive the testimony from J.C. or some of his deputies? Mr. Tom Ed Dick[ey], do any of you know him? Mr. Billy [Erbin]? Mr. Fred [Alcorn]? Do any of you know J.C. on a personal basis.?"

(C.R. 340.) J.M. did not respond to this question and was selected as a member of the jury. Just prior to his Rule 32 hearing, Jones learned that J.M. knew the sheriff and several of his deputies.

During the hearing, J.M. testified as follows concerning any effect his acquaintanceship with the sheriff and his deputies had upon his role as a juror:

> "[Jones's counsel]: In fact, you knew just about everybody around, didn't you?
>
> "[Juror J.M.]: Well, yeah.
>
> "[Jones's counsel]: You knew Judge NeSmith who was the judge at the time of the trial"
>
> "[Juror J.M.]: Yeah, uh-huh.
>
> ". . . .
>
> "[Jones's counsel]: And you knew officer Tom Ed Dickey?
>
> "[Juror J.M.]: Yes.
>
> "[Jones's counsel]: And you knew officer Fred Alcorn?
>
> "[Juror J.M.]: Yeah.
>
> "[Jones's counsel]: And you knew officer Billy Erbin?
>
> "[Juror J.M.]: Yeah.
>
> "[Jones's counsel]: And you knew the sheriff, J.C. Carr?
>
> "[Juror J.M.]: Yeah, right.
>
> "[Jones's counsel]: Do you recall whether you informed the court whether you knew these people?

"[Juror J.M.]: I don't recall. I don't believe I was asked.

"[Jones's counsel]: Were you questioned by any of the attorneys for the defendant as to whether or not you knew any of those people?

"[Juror J.M.]: Yeah, I think so. I don't-you know, that has been a long time ago.

"[Jones's counsel]: Sure, I understand. But do you recall whether in court in front of the Judge-

"[Juror J.M.]: I believe Judge NeSmith, yeah.

"[Jones's counsel]: Okay. Did you know Officer Tom Ed Dickey well enough to form an opinion as to whether or not you found him to be an honest and truthful person?

"[Juror J.M.]: Yeah.

"[Jones's counsel]: And was the same true of Fred Alcorn?

"[Juror J.M.]: Yeah.

"[Jones's counsel]: And Billy Erbin?

"[Juror J.M.]: Yeah.

"[Jones's counsel]: And Sheriff Carr?

"[Juror J.M.]: Yeah.

". . . .

"[Prosecutor]: [J.M.], the fact that you knew Judge NeSmith, Mr. Dickey, Mr. Alcorn, Mr. Erbin . . . , did that effect your verdict?

"[Juror J.M.]: No, un-un.

"[Prosecutor]: Do you recall being asked that in court by a lawyer?

"[Juror J.M.]: I don't recall it, no. It could have happened but I don't recall it being asked.

"[Prosecutor]: So, do you recall the instructions of the court that you were supposed to make your decision on the verdict and on the sentence based upon what came from that bench right there and instructions from the Judge?

"[Juror J.M.]: Right, uh-huh.

"[Prosecutor]: And even though you knew these people and you testified that they were truthful people, were you able to put that out of your mind to come to a deliberations?

"[Juror J.M.]: Render a verdict, yeah.

"[Prosecutor]: Did you in fact render your decision based upon only what came from the witness stand?

"[Juror J.M.]: What we heard, yeah.

"[Prosecutor]: And the instructions from the Judge?

"[Juror J.M.]: Yeah."

(R. 262-66, 273-74.)

We are unwilling to say that J.M. failed to respond truthfully to the question posed by Jones's counsel during voir dire examination. It is significant that Juror J.M. actively engaged in voir dire and when asked admitted that he knew the victims. As asked, the question left room for subjective interpretations by the veniremembers. Therefore, we do not find that Juror J.M.'s failure to respond to this question constitutes juror misconduct.

Moreover, Juror J.M. testified at the Rule 32 hearing that even though he knew these witnesses and perhaps

had formed an opinion that they were truthful, he based his verdict on the testimony presented and on the trial court's instructions. Because no evidence was presented that Juror J.M.'s acquaintanceship with the sheriff and his deputies actually prejudiced Jones, we find no basis for reversal on this claim. See *Limbaugh v. State*, 581 So.2d 5, 8-9 (Ala.Cr.App.1991) (a juror's failure to disclose that her daughter had died as the result of an unsolved car bombing did not create reversible error where the question calling for the information was ambiguous and she testified that the circumstances surrounding her daughter's death had no effect whatsoever upon her ability to reach a fair and true verdict). Cf. *Davis v. State*, 51 Ala.App. 200, 283 So.2d 650 (1973)(where the precise question was whether the veniremember or the veniremember's spouse had been in law enforcement, the juror had no duty to disclose the fact that his father had been a circuit solicitor).

2. Juror J.M.'s association with the victims and his knowledge of the "layout" of the victims' house.

The trial court asked the following question during voir dire examination of the jury venire:

> "Do any of you ladies and gentlemen of this jury venire know anything about the facts of this case which would influence your verdict one way or the other?"

(R. 8.) Although J.M. admitted that he knew the victims, he did not reveal that he had frequented the victims' house. Just before his Rule 32 hearing, Jones learned that J.M. had made service calls to the victims's house.

During the hearing, Juror J.M. testified as follows concerning his acquaintanceship with the victims and his knowledge of the layout of their house:

"[Jones's counsel]: Prior to the beginning of the trial in 1982 did you know Carl Willie Nelson?

"[Juror J.M.]: Yeah.

"[Jones's counsel]: And did you know him quite well?

"[Juror J.M.]: Yeah, I had done work for them.

"[Jones's counsel]: You did work at their house on more than one occasion?

"[Juror J.M.]: Yeah, uh-huh.

"[Jones's counsel]: And of course during that work you became quite familiar with the interior of that house; is that correct?

"[Juror J.M.]: Yeah, some parts of it.

"[Jones's counsel]: Which parts?

"[Juror J.M.]: The kitchen, back porch, well pump, washing machine.

"[Jones's counsel]: And you knew the layout of the house, how the rooms were arranged, that sort of thing?

"[Juror J.M..]: Just the back porch and kitchen.

"[Jones's counsel]: At the time of the trial did you consider the Nelsons to be clients or customers of yours?

"[Juror J.M.]: Well at the time I knew them I was working with a local gas company down here doing their service work.

"[Jones's counsel]: How many times prior to your service on the jury had you been in the Nelson home?

"[Juror J.M.]: Oh, two or three times.

"[Jones's counsel]: And you understood that that was the same location that the events in question in the trial occurred?

"[Juror J.M.]: Yeah. Yeah.

"[Jones's counsel]: Now, when you were following the evidence and the testimony of the trial, you had a picture in you head of that scene, that house where the events occurred; is that right?

"[Juror J.M.]: Well I knew where the location was.

"[Jones's counsel]: And you were familiar with the house, you could recall what it looked like?

"[Juror J.M.]: Just the kitchen and the back porch."

(R. 266-68.)

We are unwilling to say that J.M. responded untruthfully to the question posed by the trial court during voir dire examination and that his failure to respond constituted juror misconduct. The question, "Do any know anything about the *facts* of this case which would influence your verdict one way or the other?" left room for subjective interpretations. From the testimony presented at the Rule 32 hearing, Juror J.M. had limited knowledge of the victims' house. We do not find the fact that Juror J.M. had made two or three service calls and knew the kitchen and back porch of the victims' house, in light of the fact that the murders occurred in another location in the house, to constitute "*facts* of this case." Moreover, Jones had been informed that J.M. knew the victims and counsel could have explored during voir dire examina-

tion the basis of that knowledge. Finally, Jones has failed to establish that J.M.'s failure to indicate that he had frequented the victims' house on two or three occasions before the murders prejudiced him. Therefore, we find no basis for a finding that J.M.'s actions were prejudicial. See also *Brownlee v. State,* 545 So.2d 151 (Ala.Cr.App.1988), aff'd, 545 So.2d 166 (Ala.), cert. denied, 493 U.S. 874, 110 S.Ct. 208, 107 L.Ed.2d 161 (1989)(the mere fact that a juror is personally acquainted with the victim does not automatically disqualify him from sitting on the criminal jury).

Finally, we find nothing to indicate that Jones's trial counsel would have struck J.M. had he known the information J.M. revealed at the evidentiary hearing. Consequently, Jones has not satisfied his burden of pleading and proving this claim. See Rule 32.3 and 32.6(b), Ala.R.Crim.P.

Additionally, we reject Jones's claim that his "death sentence was the result of coercive influences brought into the jury deliberations which were outside the scope of the evidence and judicial control." (Appellant's brief at p. 97.) Specifically, he argues that a juror's statement that "if we give him life that maybe in a few years that he would be up for parole" improperly persuaded others to sentence him to death. (R.-275-76.)

Testimony at the Rule 32 hearing indicated that before reaching its 12-0 advisory verdict recommending a sentence of death, the jury voted several times. Several ballots resulted in a 10-2 determination to recommend death. One of the two individuals who initially voted against death testified that she changed her vote in favor of death after J.M. made the statement regarding parole.

> "A juror cannot impeach his verdict by later explaining why or how the juror arrived at his or her

decision." *Adair v. State*, 641 So.2d 309, 313 (Ala.Cr.App.1993).

Moreover, Rule 606(b), Ala.R.Evid., provides, in pertinent part:

> "Upon an inquiry into the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon that or any other juror's mind or emotions as influencing the juror as to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes."[2]

We find no merit to Jones's claim because it was based on prohibited testimony. A consideration of the claim would destroy the integrity of the jury system, encourage the introduction of unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a verdict without fear of post-trial harassment, publicity, or scrutiny. See *Ex parte Neal*, 731 So.2d 621 (Ala.1999); and *Barbour*

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[2] Although the Alabama Rules of Evidence became effective January 1, 1996, Rule 606(b) "leaves unchanged Alabama's historic 'anti-impeachment' rule." Advisory Committee's Notes, Rule 606.

v. State, 673 So.2d 461, 469-470 (Ala.Cr.App.1994), aff'd, 673 So.2d 473 (Ala.1995), cert. denied, 518 U.S. 1020, 116 S.Ct. 2556, 135 L.Ed.2d 1074 (1996).

Furthermore, Jones has failed to show that he suffered any prejudice in this regard. "[T]he judge, and not the jury, is the final sentencing authority in criminal proceedings.' *Ex parte Hays*, 518 So.2d 768, 774 (Ala.1986)." *Ex parte Giles*, 632 So.2d 577, 583 (Ala.1993), cert. denied, 513 U.S. 1199, 115 S.Ct. 1271, 131 L.Ed.2d 149 (1995). Here, the challenged verdict is advisory. A jury during the sentencing phase only needs 10 votes to render an advisory verdict of death. Before J.M.'s alleged coercive statement the vote was 10-2 for a recommendation of death; therefore, we find J.M.'s alleged improper influence to be at most harmless error. Rule 45, Ala.R.App.P.

VI.

In his petition Jones claims that "[s]ince the time of trial, newly discovered evidence critical to the issues of conviction and sentencing has arose." (C.R. 209.) Specifically, Jones argues that there is a discrepancy between the testimony of Brenda Nelson at Jones's trial and her testimony at the sentencing hearing of Jones's accomplice. However, Jones abandoned this claim on appeal. *Brownlee v. State*, supra.

Moreover, the trial court, after determining that Jones had failed to meet his burden of proof pursuant to Rule 32.1(e), Ala.R.Crim.P., addressed this claim on its merits. The trial court stated in its order:

> "The allegedly 'newly discovered evidence' consists of the testimony of Brenda Nelson, the state's primary eyewitness in the trial of Mr. Jones, at the

1991 sentencing hearing of Arthur Lee Giles, the co-defendant of petitioner. In the sentence proceedings she testified that she had seen Arthur Lee Giles 'killing' her mother with a knife.

"During his cross-examination of Brenda Nelson, trial counsel for petitioner impeached her by bringing to her attention the statements that she had made under oath at prior proceedings in this case. The prior testimony was the same as that now alleged as newly discovered, namely that she had seen Arthur Lee Giles, not the petitioner, attacking her mother with a knife. Trial counsel successfully entered into the record portions of the preliminary hearing and of the petitioner's first trial in 1979, and successfully prevented the prosecution from entering the entire document. Brenda Nelson's inconsistent statement is not newly discovered but was known by petitioner's counsel at time of trial and utilized by them to impeach the primary witness that the state produced. Nelson's re-statement at Giles's 1991 hearing is identical to previous inconsistent statements and is cumulative to the facts known at the time of trial. Rule 32.1(e)(2) and Rule 32.1(e)(3)."

(C.R. 1068.)

We agree with the trial court's finding that Brenda Nelson's inconsistent statements do not constitute newly discovered evidence. Rule 32.1, Ala.R.Crim.P.

VII.

Additionally, we note that numerous claims in Jones's petition, which he abandoned at the evidentiary hearing and on appeal, were precluded by the procedural bars of Rule 32.2(a). This court has recognized that "[t]he pro-

cedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed." *State v. Tarver,* 629 So.2d at 19. See *Horsley v. State,* 675 So.2d 908 (Ala.Cr.App.1996); *Grayson v. State,* 675 So.2d 516 (Ala.Cr.App.1995), cert. denied, 519 U.S. 934, 117 S.Ct. 309, 136 L.Ed.2d 225 (1996); *Brownlee,* supra; *Cade v. State,* supra.

We find that the following claims in Jones's petition are procedurally barred under Rules 32.2(a)(2) and (4), Ala.R.Crim.P., because they were raised and addressed at trial and on direct appeal:

1. Jones's claim that his right to a fair trial by an impartial jury was violated by the trial court's failure to grant a change of venue. *Jones v. State,* 520 So.2d at 546-48.

2. Jones's claim that the trial court's and appellate court's failure to consider mitigating evidence that was clear from the record violated Alabama law and his rights under the Eighth and Fourteenth Amendments to the United States Constitution. *Jones v. State,* 520 So.2d at 555.

We find that the following claims in Jones's petition are procedurally barred under Rules 32.2(a)(3) and (5), Ala.R.Crim.P., because they could have been raised at trial and on direct appeal, but were not:

1. Jones's claim that he was deprived of a fair trial by the systematic underrepresentation of blacks and other cognizable groups in the grand jury.

2. Jones's claim that he was deprived of a fair trial by the systematic underrepresentation of blacks and other cognizable groups in the trial jury.

3. Jones's claim that he was deprived of a fair trial by the prosecutor's use of peremptory challenges in a racially discriminatory manner.

4. Jones's claim that the trial court's instruction on capital murder and the lesser included offenses of murder in the first degree and murder in the second degree were inadequate and violated his right to due process and to a fair trial.

5. Jones's claim that he was denied a fair trial by the prosecutor's improper closing argument during both the guilt stage and the penalty stage, including references to the worth of the victims and the victims' family and his racist, inflammatory, and prejudicial characterization of Jones.

6. Jones's claim that Alabama's death penalty is arbitrarily and discriminatorily applied in violation of the Eighth and Fourteenth Amendments.

7. Jones's claim that the failure to transcribe fully all trial court proceedings and to preserve and secure all physical evidence and trial exhibits deprived him of a full appeal and a statutorily mandated review of his capital conviction and his sentence of death.

8. Jones's claim that his right to stand trial was violated because the trial court failed to hold a pretrial hearing concerning his competency to stand trial.

9. Jones's claim that the state's introduction at trial of allegedly highly inflammatory and prejudicial photographs of the victims violated his rights.

10. Jones's claim that prosecutorial misconduct deprived him of rights guaranteed by the Fifth,

Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the State Constitution of Alabama.

11. Jones's claim that he was convicted of capital murder and sentenced to death, despite a lack of evidence that he had the intent to kill.

12. Jones's claim that the Alabama death penalty statute violates the Sixth, Eighth, and Fourteenth Amendments and the Alabama Constitution by failing to provide meaningful comparative review for those defendants under a sentence of death.

13. Jones's claim that electrocution as a means of punishment violates the Eighth Amendment's prohibition against cruel and unusual punishment.

14. Jones's claim that the trial court's instruction on intent and malice shifted the burden of proof and violated his rights to a fair trial and due process.

15. Jones's claim that he was denied a fair trial by the prosecutor's allegedly improper closing argument during both the guilt stage and the penalty stage of his trial.

We find that the following claims in Jones's petition are procedurally barred under Rules 32.2(a)(2) and (5), Ala.R.Crim.P., because they were raised and addressed at trial and could have been raised and addressed on direct appeal, but was not:

1. Jones's claim that he was deprived of due process, equal protection, and a fair trial and sentencing determination because the trial court refused to provide funds for expert assistance.

2. Jones's claim that the admission of his inculpatory statement violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

As previously stated, this court on direct appeal searched the entire transcript for error, pursuant to Rule 45A, Ala.R.App.P. If this court had found anything that would merit reversal, even if it had not been raised on appeal, we would have reversed the judgment and remanded this case for a new trial. Based on our review of the evidence presented at the evidentiary hearing on Jones's Rule 32 petition, we conclude that the trial court properly denied Jones's petition.

AFFIRMED.

LONG, P.J., and MCMILLAN, COBB, and BASCHAB, JJ., concur.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Filed March 23, 2006
No. 04-11911-P

AARON LEE JONES,

Petitioner-Appellant,

—versus—

DONAL CAMPBELL, Commissioner,
Alabama Department of Corrections,

Respondent-Appellee.

On Appeal from the United States District Court for the Northern District of Alabama

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ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC
(Opinion January 20, 2006, 11th Cir., 2006, ___ F.3d. ___).

Before: ANDERSON, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en bane (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/S/ JOEL F. DUBINA
UNITED STATES CIRCUIT JUDGE

28 USC § 2254(d)

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[LETTERHEAD OF
SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK]

June 7, 2006

Mr. Wayne Alan Cross
White & Case, LLP
1155 Avenue of the Americas
New York, NY 20036

Re: Aaron Lee Jones
v. Donal Campbell, Commissioner,
Alabama Department of Corrections
Application No. 05A1119

Dear Mr. Cross:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Thomas, who on June 7, 2006 extended the time to and including July 21, 2006.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ GAIL JOHNSON
Gail Johnson
Case Analyst

EXCERPTS OF TESTIMONY OF GEORGE BOLES AT RULE 32 EVIDENTIARY HEARING

GEORGE BOLES,

Being first duly sworn the witness testified as follows:

EXAMINATION BY MR. MCCREA:

* * * *

Q. How long have you been practicing law?

A. Since '68.

Q. Can you briefly describe your practice since 1968?

A. From '68 to '70 I was in a law firm practicing principally transportation and condemnation and municipal law. Then I was an Assistant District Attorney for about two years in Huntsville, Alabama. Then I went back to Birmingham and I have had principally a transportation practice, but we have municipal law and zoning and land condemnations and some plaintiffs work.

Q. And that is what you have been doing since you went back into private practice to date?

A. Yes.

Q. You were appointed by the court to represent Mr. Aaron Jones in his 1982 trial; is that correct?

A. Yes.

Q. Now when you were an Assistant District Attorney, sir, there wasn't any death penalty in force in Alabama; is that right?

A. No.

Q. You had no opportunity to try any capital cases at that time?

A. Well, if you define capital cases as one with which the death sentence could be imposed, that's true.

Q. That's how I am defining it.

A. But the Supreme Court said we could not impose the death sentence at that time, but they still were capital murder cases.

Q. And you never served as a defense attorney in any capital case or any murder case up until the time that you represented Mr. Jones in 1982; is that correct?

A. That's correct.

Q. You were partners with Mr. Jack G. Davis at the time that you were appointed to serve as Mr. Jones' counsel; is that correct?

A. Yes.

Q. And Mr. Davis had been representing Mr. Jones prior to your involvement; is that correct?

A. That's my understanding, but I hasten to add that I base that upon what he told me. Files I saw—I had no concrete-type documents or information.

Q. I understand. And Mr. Davis asked you to come up to Blount Cou[illegible] at a time shortly before Mr. Jones [sic] trial began for the purpose of negotiating a plea agreement; is that correct?

A. Essentially that's correct.

* * * *

Q. Did you do anything to prepare for your testimony today, sir?

A. I didn't give testimony. Do you mean prepare for the trial?

Q. Yes.

A. Yes, in the time that I had I did review the file to the extent that I had.

Q. I'm sorry, I didn't hear the end?

A. I reviewed the files to the extent that I had time to do it. There was some time, if my memory serves me correctly, before the trial started. That is, they were starting another trial and we had to get the jury, that sort of thing, and it took two, three hours. It was not a matter of two or three weeks preparation. And then during the trial, as it went along, it was possible to review files in advance of the next day's testimony.

Q. You are speaking of the 1982 trial?

A. Yes.

* * * *

Q. I understand. Now, it is true, is it not, that you were appointed to represent Mr. Jones at his 1982 trial because Mr. Davis had relatively little criminal law experience; is that correct?

A. I don't know that.

Q. You formed a judgment, did you not, at that time about Mr. Davis' ability to conduct a defense in a capital trial?

A. I wouldn't say that I formed a judgment.

Q. You did not conclude that Mr. Davis was in over his head in trying to defend this case?

A. No, I don't think I could say that I formed that kind of conclusion, Grant.

Q. You don't recall telling me that in a meeting in your office?

A. Well you are trying to—I don't know mean [sic] you are trying to, but you are asking a question did I inform [sic] a conclusion that he was incompetent or that he was in over his head. I formed a conclusion that he needed some help, perhaps, and that's maybe what I told you. I don't think I ever said that he was incompetent.

Q. Well my question was not phrased in terms of incompetence, Mr. Boles.

A. Okay. Stated loosely, he needed help. But anybody would need help.

* * * *

Q. Now you were appointed to act at [sic] counsel for Mr. Jones at the trial?

A. Yes.

Q. As trial counsel. Sometime very shortly before the trial began; is that correct?

A. Yes.

Q. I believe you said on Friday that it was twenty or thirty minutes before the trial began. Is that correct?

A. I don't remember, but it was not long. The records would have to reflect, you know. And let me preface many of my answers with the fact that you and I and all of us know that you have to go to the record. The record is certainly more concrete than my recollection. But my recollection is that it was not a long period of time.

Q. But you do recall that before the beginning of the trial you did not have a chance to interview any witnesses?

A. That's right.

* * * *

Q. But you didn't review any documents or files in the course of those conversations?

A. No. My point was, simply, that I had a general impression of what was going on.

Q. I understand.

A. Better than somebody just walking in off the street.

Q. I understand. Now, as I understand it, you considered yourself, when you were appointed, to be the person who was there to try the case. Is that correct?

A. I don't really know what you mean by that.

Q. Well those are the words you used on Friday, sir?

A. Well, yeah, I was there. I was taking responsibility.

Q. You were taking responsibility as to what evidence would go in and what would not?

A. No. I would say I took senior responsibility. Jack was not and [sic] idiot, and Jack had tried the case the first time with Tommy Roundtree, and I respected his judgment too. So, we would talk, if there was time to talk. Often, of course, there is not time to talk. The question is asked and either somebody has got to object or not object. You don't have time to confer. But when there was time to confer we talked about what we could talk about.

Q. But as the senior trial attorney there you made the final decision as to what evidence went in and what did not?

A. Yes, probably.

Q. Do you recall any occasion when Mr. Davis made the final determination as to what evidence went in and what did not?

A. No, I would not. It could have happened and I wouldn't recall it. That is just—you know, you have got to remember, it is thirteen years ago and it is a six-day trial.

Q. I understand that. I'm asking for your best recollection.

A. My best recollection.

Q. Your best recollection is that you don't recall any occasion when Mr. Davis told you what to do. Is that correct?

A. That's correct.

* * * *

Q. Did you approach any professionals in order to determine whether or not they may be of assistance to you in trying the case?

A. I don't think I did.

Q. You don't recall approaching any medical, health professionals?

A. Well, when you say "did I approach," do you mean did I approach them for the purpose of seeking their expert testimony?

Q. Yes.

A. No, I don't think so. But I had a substantial number of friends in the medical community with whom I probably, and this was thirteen years ago, but knowing my own machinations and the way my mind works and the way my mouth works, I am always asking people questions, I would feel fairly satisfied, Grant, that in the course of this thing when I had a recess during the evening, I might have called a friend of mine and said what do you think about thus and so. I don't even recall the issues, but if there was a medical issue arising in the course of the trial, then I probably would have called a friend of mine and asked him what he thought about it to get some sense of what I might ought to do or not do. But I just don't recall.

Q. You don't have a specific recollection of doing that?

A. I don't have a specific recollection it. [sic] I base that on the way I traditionally do things.

Q. You are speculating what you may have done?

A. Absolutely.

* * * *

Q. At the conclusion of the guilt/innocence phase of the 1982 trial, you knew, did you not, that the next phase would be the sentencing phase?

A. Yes.

Q. And the sentencing phase began more or less immediately after the guilt/innocence phase; is that correct?

A. The next day I think.

Q. The next day. And did you ask for a continuance in order to properly prepare for the sentencing phase of the trial?

A. If it is not in the record, I didn't ask for it.

Q. If it is not in the record you didn't ask for it?

A. That's right.

Q. You understood, of course, that your client's life was on the line at the sentencing phase?

A. Yes.

* * * *

Q. Now getting back to what was actually done, the fact is that the only evidence that you put on at the sentencing phase was to put Aaron Jones on the stand and to only ask him questions about his prior conviction; is that correct?

A. I don't recall. The record—what the record shows.

Q. I will represent to you that the record reflects that is the only evidence put on by the defense?

A. If that is what the record says that is it.

* * * *

Q. How much time did you spend preparing with Mr. Jones for the testimony that he was to give at the sentencing stage of the trial?

A. I don't recall right now.

Q. You don't recall anything about that?

A. No, I just said I don't recall how much time.

Q. What do you recall about what preparation you did?

A. I just recall that we talked to Aaron extensively. Whether it was two hours, twelve hours, forty-five, I don't recall right now. The problem with Aaron as a witness is, you know, the record certainly reflects prior records. You are really hurting as you have one witness who can help you to explain his case away, and he has got a prior record. That is going to aggravate the jury and you are kind of stuck with that fact.

Q. What investigation did you do of anything that you might be able to introduce before the jury to explain that record away or to make them think less of him?

A. I don't recall right now, but I did try find [sic] out. For example—by way of example, and I do not intend to imply on this record that this is a specific fact by way of example, but I would say Aaron got a second degree murder conviction and what happened is? And Aaron would say, for example, Well [sic] it was a bar room fight and the other fellow started it and I was charged with first degree murder and I was convicted of second degree murder and that explains it. It really wasn't as bad as it sounds, if I make my point clear on this record that that sort of question and answer and discussion with Aaron took place.

* * * *

Q. Did you ask any family members to come and speak with Mr. Jones to try and convince him if you were going to put him on the stand that he should express remorse to the jury when he did something?

A. I did not. Grant, I'm almost reluctant to say this, but I have some recollection that there was estrangement

maybe between Aaron and some members of his family. That may not be correct, but I have that impression that there was some estrangement between some member or members of his family that might have helped and perhaps they even were willing to help at the first trial, but by the time the second trial came along they weren't friendly or weren't helpful. But that is my recollection of what Jack perhaps told me.

* * * *

Q. You conducted the 1982 trial; right?

A. I participated in it.

Q. You were the lead counsel at that trial; correct?

A. Lead counsel is a little strong, but I was the more older [sic] of the two lawyers.

Q. I believed you used the term "senior counsel" at the trial. Is that correct?

A. I was the older of the two.

Q. Sorry, sir?

A. I was simply the older of the two, I think I said in response to your initial questions that I somewhat took the lead for most of the trial because of the fact that I was simply older and—

Q. And you had had your experience in the District Attorney's office and Mr. Davis had had no such experience. Is that correct?

A. I think that is true.

* * * *

Q. Did you consider whether you should investigate the possibility of introducing psychological or psychiatric testimony at the sentencing phase of the trial, sir?

A. Yeah, we talked about that.

Q. You talked about that.

A. Jack and I. I do not know specifically what was said, but we talked about all of those things.

Q. Did you do anything other than talk, sir?

A. No. * * * *

* * * *

Q. And some how another [sic] you and Jack decided not to introduce any testimony from any family members; is that correct, sir?

A. There was not any testimony from family members introduced. My recollection, which is pretty sketchy because, again, this and everything else and goes back thirteen years, but that there was some problem with the family members at that time and there was some reason that Jack didn't want to bring the family members into it. I don't remember what it was, Grant, but I just recall vaguely that there was some problem with family members.

Q. Every family member that Aaron Jones had?

A. All I'm telling you is I remember Jack telling me that there was some problem of—I say I remember, but I have a recollection of some sort that Jack was saying that there was a problem with the family members. I

don't remember what it was, I don't know who it was. At this time I couldn't tell you.

* * * *

EXAMINATION BY MR. POOLE:

* * * *

Q. Okay. When you came and negotiated the plea agreement, how long had you been either officially on the case or do you recall how long you had been directly involved in the case when you came in?

A. Well let me be silly; fifteen minutes, which is not literally correct. But I had been hearing about it and talking to Jack about it for a long time. And as I said, anecdotal, and when I'm trying to do something important and productive and Jack wants to talk about Aaron Jones; that went on quite a bit. So I had been hearing about it for a long time. And than he asked me to come up here and help him negotiate the plea. And at that time I thought Tom Roundtree, who helped try the case the first time, was going to help him try the case.

Then Judge NeSmith said that he was going to excuse Roundtree, and so there I was and I said Wait [sic] a minute, I'm going to have to try this thing. I don't know the time frame, but that's pretty much how it happened.

* * * *

Q. Let me back up from that. With your involvement in the case, how many times did you meet with Aaron? I mean, I realize that you came into the case late, but how much of an opportunity did you have to meet with him prior to trial?

A. Well it is probably accurate to say that we were together for six days during the trial periods, and we started at 9:00 and got through at 5:00. And on Saturday, at the conclusion of the sentencing phase, we were together at that period of time. There would be communications back and forth, but Aaron was not very communicative with me, at least. He might talk to Jack, but he didn't want to communicate much with me for some reason.

Q. That's kind of what I want to get to. Let me ask you a few questions on that. Just clarifying, but your actual involvement basically is at the time of trial?

A. Essentially, yes.

* * * *

Q. Did you ever meet with Mr. Jones during the course of the trial other than in the courtroom?

A. Yes, we met in the courthouse.

Q. Over [sic] than in the courthouse?

A. No.

Q. You never visited him in prison?

A. No.

Q. In jail?

A. No. I didn't.

* * * *

Q. Do you think, sir, that you had a duty to try to get your client acquitted on the charges?

A. No.

Q. Did you think you had a duty to try to avoid your client getting the death penalty?

A. The way you stated that, no.

* * * *

[LETTERHEAD OF STATE OF ALABAMA
DEPARTMENT OF MENTAL HEALTH]

April 20, 1979

(State of Alabama)
(Blount County)

To: Mr. John Green
Clerk of the Circuit Court
Blount County Courthouse
Oneonta, Alabama 35121

Under the provisions of Section 15-16-22, Code of Alabama, 1975, otherwise known as a Lunacy Commission, one Aaron Jones, charged with Criminal Action No CC-79-077 and CC-79-078, was admitted to Bryce State Hospital on April 5, 1979, under order of the Honorable Carl D. Nesmith, Judge, Circuit Court of Blount County, Alabama dated the fourth date of April, 1979, for examination and report as provided for under the law referred to herein.

In compliance with the provisions of the law referred to above, the Superintendent of Bryce State Hospital appointed Thomas L. Smith, M.D., Consultant Psychiatrist, James C. Thompson, M.D., Staff Psychiatrist, and Kamal Nagi, M.D., Staff Psychiatrist who constitute the undersigned commission. This patient also underwent physical, neurological, and psychological evaluations by qualified personnel.

Psychological evaluation revealed intellectual functioning at the low average range.

Psychiatric evaluations revealed diagnoses of personality disorder, and alcohol and substance abuse.

The Neurological evaluation results were within normal limits. The skull x-ray and the electroencephalogram were also within normal limits.

After having the said Aaron Jones under our study and observation continually from the date of admission to the present date, we submit the following report:

1) The Lunacy Commission is of the opinion that Aaron Jones is presently competent to stand trial and to assist in the preparation of his own defense. Also, Mr. Jones understands the nature of the charges against him.

2) The Lunacy Commission is of the opinion that Aaron Jones was not suffering from a mental illness at the time of the acts charged which would have prevented him from distinguishing right from wrong.

3) The Lunacy Commission is of the opinion that Aaron Jones was not suffering from a mental illness at the time of the acts charged which would have prevented him from adhering to the right.

Details of Mr. Jones evaluation are filed in his medical record and will be furnished to the court upon receipt of a subpeona duces tecum by the Custodian of Medical Records.

Signed and executed this the 20th day of April, 1979, at Bryce Hospital, Tuscaloosa, Alabama.

/s/ THOMAS L. SMITH, M.D.
Thomas L. Smith, M.D.
Consultant Psychiatrist

/s/ JAMES C. THOMPSON, M.D.
James C. Thompson, M.D.
Staff Psychiatrist

/s/ KAMAL NAGI, M.D.
Kamal Nagi, M.D.
Staff Psychiatrist

/sah
#2744
5/4-2

FILED IN OFFICE
July 17 1979

JOHN B. GREEN
Clerk, Circuit Court

DEFENDANT'S EXHIBIT 15

Include: Physical appearance and behavior during interview, affect and mood, speech (coherent, flight of ideas, blocking, etc.), train of thought, content of thought, orientation, memory and intellectual capacity, and patient's idea of why he is in the hospital.

Name: Aaron Jones
File: 03 88 25
Unit: Forensic Ward: _____
Date of Birth: 4-23-52 Sex: _____
Date: _____

WPC Received: April 5, 1979
WPC Typed: April 9, 1979

Mr. Aaron Jones is a 26 year old, single, black male committed here from Blount County for lunacy determination charged with Murder and Assault With Intent To Murder. Background on this individual reveals that he was born and raised in Birmingham. At a very early age, his father and mother divorced and he was turned over to his maternal grandmother for raising. He lived with this grandmother and his father up to age ten. At this point he was turned over to his paternal grandmother who continued to raise him. He describes a rather brutal situation with his father and on one occasion was whipped severely with a cord leaving scars on him which he well remembers. This also happened to one of his sister. [sic] He claims to have two brothers and two sisters in all. Apparently one brother and one sister are half sisters and brothers. He attended public schools through the eleventh grade with no difficulty learning. He had some [sic] minor disciplinary problems as an adolescent.

There were two charges of petty larceny for which he was treated as a juvenile and turned over his grandmother without serving any time. Apparently he had a fair peer relationship with no particular problems in this area. After leaving school, he worked at a bowling alley and at the time of his current trouble was working at the Birmingham Stove and Range Company as a molder. He had been working there approximately two years. Alcohol and drug history reveals that he started drinking alcohol at age 13 and developed a fairly strong habits [sic] for alcohol with an habitual excessive drinking pattern. He occasionally had some "shakes" coming off of alcohol but no DT's. He also frequently mixed barbiturates with alcohol and "angel dust". Marijuana was also used. He also started using heroin and claims to have been addicted to this. At other times he would take Talwin when he could not get heroin. His habit cost was up to about $30.00 a day at one point. Past legal history reveals 1) a robbery and assault charge, for which he was given a five year probated sentences [sic]. He later got his second charge when he got into a fight in 1972. This fight ended in the death of a man and he was charged with Assault With Intent To Murder. There is some evidence that the man's arm was shot off during this fracas. He claims to have been drinking at the time this occurred. He served from 1972 to 1977 in the penitentary on this charge. After being discharged from the penitentary in 1977, he had no further charges until his current charge. Currently he says that he has two counts of murder and four counts of assault with intent to murder against him. He explains that he and Arthur Giles the other defendant in this case, were both employees at the Birmingham Stove and Range Company. He claims that Giles asked him accompany him one evening to make some money. He went along with Giles in order that two

friends could get a ride home. He had made no previous plans with Giles but had merely gone along with him. Giles asked him to go with him to Oneonta. After he got there, there was a shooting in which two people were killed and several people injured. This patient states that he did not know the people as Giles did. He tells in detail of going to a trailer house and later to the house where the people were killed and injured. The way he describes it, Giles demanded that he take part in the activities which led to the killings and injuries. He claims to have stabbed one person and says that at his preliminary hearing he was told that he stabbed three people including a small boy and girl. He claims to not remember these later events however. He is currently not sleeping too well at night but his appetite is fair. He denies any delusions or hallucinations past or present. He denies any past history of seizure disorder or significant head injury prior to the alleged incident.

Mental Status Examination General Appearance

This was tense [sic], black male of apparent stated age without significant abnormal motor movements. His tension diminished as he gave the history. He was spontaneous and lucid. He spoke without any loosening of associations. His affect was within normal range. There was no significant autism or ambivalence present. His ability to abstract thought is not significantly impaired to proverb and similarity testing. His content is negative for delusions or hallucinations. Reality testing in tact [sic]. Orientation times three. Judgment and insight fair to good. Attention span and memory are good. Calculations good. General information store fair to good.

Impression: Personality disorder. Habitual excessive drinking (303.1), Drug dependency synthetic and analgesic type (304.1).

/s/ THOMAS L. SMITH, M.D.
Dr. Thomas Smith

/slb
1/2-3
2391

DEFENDANT'S EXHIBIT 6

MENTAL STATUS EXAM

Include: Physical appearance and behavior during interview, affect and mood, speech (coherent, flight of ideas, blocking, etc.), train of thought, content of thought, orientation, memory and intellectual capacity, and patient's idea of why he is in the hospital.

Name: Jones, Aaron
File: 03 88 25
Unit: Forensic Ward: _____
Date of Birth: 4-23-52 Sex: M
Date: _____

WPC Received: April 11, 1979
WPC Typed: April 12, 1979

This 26 year old, single, black, male, court committed to the Forensic Program because of murder charges and assault with intent to murder.

HISTORY AND BACKGROUND: Please refer to social history.

Mr. Jones was interviewed. He came to the interview willingly, was cooperative, and shook hands with the interviewer. He was anxious but after I explained to him the purpose of the interview, he calmed down and asked if he could smoke a cigarette, and was granted that privilege. He started by asking if he were permitted to apologize to the family (he means the remaining members of the victim's family). He said that on the day when the crime was committed, he was at his sister's house and his friend Arthur Giles asked him to come join him to

take care of someone in a trailer. He carried a gun and a pocket knife with him. That gun belonged to his brother-in-law. He gave reasons that his girlfriend has a friend who does not like him and so he carried it for self protection. He stayed in the car until he was asked by his friend Arthur Giles to come in the trailer, after he heard shooting and screaming coming from the trailer. His friend asked him if he had bullets. He guessed that the conflict between his friend and the man was about drugs. The patient said that at one time he was about to fall on his back while in jail, and no treatment was given. No definite symptoms suggestive of drug or alcohol dependence or intoxication were seen. He said that he used to drink alcohol when he was thirteen, and after he came out of jail, he started using drugs; THC, Taloin and heroin, and it cost him about $25.00 to $30.00 at one time. He blamed all of what happened on his friend and gave reasons why it was necessary to kill all members of the family as the children were able to identify his friend, who used to work for the family before the murder. He thought that it was due to conflict between his friend and the man used to plant marijuana on his land. He said that he was ordered by his friend to cut them up. He did not know why he did that!! He said that he spent five years of a ten-year sentence for attempted murder and left in 1977 and while in jail he got his G.E.D. After leaving jail, he worked several jobs as a molder, with heaters and machines.

On examination, the patient looked his stated age, was of average weight, and did show some anxiety while telling the story of how he got involved in the murder. He used denial, blaming others, intellectualization. His thought content and stream were within normal range, and did not show any disorder. Reality testing was intact. Abstract thinking was intact. Intelligence was average.

Memory, both recent and remote, recall and retention, was intact. He was oriented to three spheres. Judgment and insight were fair to good.

Impressions:

1. Antisocial personality.

2. Rule out possible habitual excessive drinking and rule out possible drug dependence from history.

/s/ KAMAL NAGI, M.D.
Kamal Nagi, M.D.
Staff Psychiatrist

11/rs/4/2-3 2537

DEFENDANT'S EXHIBIT 14

REPORT OF PSYCHOLOGICAL EVALUATION
BRYCE HOSPITAL

NAME Jones, Aaron
FILE NO. 03 88 25
UNIT Forensic WARD 27 West
DATE OF BIRTH April 23, 1952 SEX M

Age: 26
Education: Eleventh grade
Date of Admission: April 5, 1979
Date of Testing: April 6, 1979
WPC Received: April 9, 1979
WPC Typed: April 10, 1979

TESTS ADMINISTERED: Wechsler Adult Intelligence Scale (WAIS), Bender-Gestalt (B-G), Graham-Kendall Memory For Designs (MFD), Modified House-Tree-Person (HTPP), Rotter Incomplete Sentences Blank, Minnesota Multiphasic Personality Inventory Form R (MMPI), and informal interview.

REASON FOR REFERRAL: Background data for a Lunacy Commission.

RELEVANT BACKGROUND INFORMATION AND BEHAVIORAL OBSERVATIONS: Mr. Jones is a single, black, 26 year old father of two very young sons who was admitted to the Forensic Program on April 5, 1979, with charges of two counts of Murder and four counts of Assault With Intent to Murder. Mr. Jones has a prior conviction on similar charges and was confined from 1972 through 1977. While in jail and subsequently, Mr. Jones abused alcohol and a wide range of drugs.

Mr. Jones is the youngest of three children born to his parents who were divorced when he was very young. He and his brother and sister were rejected by their mother and made their home with their father and maternal grandmother until their father's death when Mr. Jones was eight years old and his grandmother's death when he was ten years old. Mr. Jones reports that he was beaten by his father as a young boy. After his paternal grandmother's death, the three children were raised by their maternal grandmother with whom Mr. Jones currently continues a close and loving relationship.

Mr. Jones was an alert, cooperative young man who did not initiate any conversation but responded pleasantly and relevantly to all inquiries. He had no difficulties in understanding and following directions and worked at moderate speed throughout testing.

INTELLECTUAL FUNCTIONING: On this administration of the WAIS, Mr. Jones earned a Verbal IQ of 83, a Performance IQ of 88, and a Full Scale IQ of 84. All findings are within the low average range and considered an adequate but not optimal estimate of his true ability level. Mr. Jones' scores may be depressed by sociocultural deprivation and test cultural bias against some minority groups.

ORGANICITY: Testing is suggestive of organic impairment. On the B-G, Mr. Jones had minor distortions and difficulties with hexagonal figures. On the MFD his difference error score was within the brain damaged range. These findings may represent the residual effects of his alcohol and multiple substance abuse rather than a primary perceptual motor deficit.

PERSONALITY STRUCTURE AND FUNCTIONING: Mr. Jones' social history reveals many significant rejections and losses from early childhood through ten years of age. These must have undermined his feelings of self worth, trust in others, and stability in his personal world. His five year incarceration as a young adult and his overinvolvement with alcohol and drugs has undoubtedly interfered with his acquisition of independent, mature, responsible, adult male attitudes and behaviors. Mr. Jones' Sentence Completion shows some self pity but also regret, depression, suicidal thoughts, and the loss of a future which could have included marriage and a loving relationship with two sons. Mr. Jones' MMPI profile is invalid and can best be interpreted as a plea for help. Although Mr. Jones may have experienced psychotic like phenomena, these may have been associated with states in which his consciousness was altered by alcohol and/or multiple other substances he has abused.

DIAGNOSTIC IMPRESSIONS: Mr. Jones is a self admitted alcohol and multiple substance abuser whose testing is suggestive of organic impairment. He may also have experienced psychotic like states.

SUMMARY AND RECOMMENDATIONS: Mr. Jones is a single, black, 26 year old, ex convict and father of two sons, who was admitted to the Forensic Program April 5, 1979, with charges of Murder and Assault With Intent to Murder. Testing suggests organic impairment which may be a residual effect of his alcohol and multiple substance abuse. His psychotic like experiences may also be associated with these abuses. Mr. Jones has been referred to a Lunacy Commission.

/s/ PATRICIA ANNE LARKIN
Patricia Anne Larkin, M.A.
Psychologist III
Examiner

/s/ Edwin C. Seger
Approved: Edwin C. Seger, Ph.D.
Psychologist V

11/rs/2/1-3 2438

EXCERPTS OF DEPOSITION OF
DR. JAMES C. THOMPSON

IN THE CIRCUIT COURT OF
BLOUNT COUNTY, ALABAMA

Case No. CC79-093 and 092

STATE OF ALABAMA

Plaintiff

—VS—

AARON JONES

Defendant

Deposition of
DR. JAMES C. THOMPSON
July 19, 1979

APPEARANCES:

HON. THOMAS L. ROUNTREE, Attorney, Oneonta, Alabama, appearing for and in [sic] behalf of the defendant, Aaron Jones.

HON. DENNIS ABBOTT, Assistant District Attorney, Pell City, Alabama, appearing for and on behalf of the State of Alabama.

* * * *

ON EXAMINATION BY MR. ROUNTREE:

Q. State your name.

A. James C. Thompson.

Q. And your occupation, please, sir.

A. Staff Psychiatrist at Bryce Hospital.

Q. And how long have you been so employed?

A. About 18 years.

* * * *

ON EXAMINATION BY MR. ABBOTT:

* * * *

Q. Based on your interview with this individual, did he have any sort of mental illness or disease, or was it merely a personality disorder?

A. Well, personality disorders are listed among the mental illnesses. It is not a psychotic illness. I consider it more a personality problem than a mental illness.

* * * * *

ON EXAMINATION BY MR. ROUNTREE:

* * * *

Q. In this case, you told Mr. Abbott that Mr. Jones appeared to you to be easily lead, [sic] I believe?

A. Yes.

Q. Would a person such as Mr. Jones, under the influence of PCP and even possibly alcohol, would they

be more receptive to the suggestions or motivations by an outside force than otherwise?

A. Quite possibly.

Q. Would it be probable in this case based on the history that you have?

A. I would think so.

Q. Did Mr. Jones inform you that on the occasion of the offense for which he was charged, that he had consumed several marijuana cigarettes which had been laced with PCP?

A. He said he had been smoking marijuana; I don't remember about smoking marijuana which had been laced with PCP.

Q. If I informed you that it had been determined that he was smoking marijuana which had been laced with PCP, could that have brought on a toxic psychotic episode?

A. Yes, it could, but I don't think under the influence of that, he could have recalled events as well as he did.

Q. PCP is an hallucinogen, is that right?

A. Yes.

Q. A person who is under the influence of an hallucinogenic drug, is it not common that certain of their perceptory faculties are increased . . . their visual perceptions, their hearing perceptions . . .

A. They think perhaps it is. I think it is mainly a subjective thing . . . they think they are, but I doubt it very seriously if they are.

Q. Can a person that has had . . . been on a PCP trip . . . are you saying they cannot recall the circumstance surrounding . . .

A. I think they would have a great difficulty, yes.

Q. It is your opinion they would have great difficulty?

A. Yes.

Q. Would that depend on the amount of the drugs they had consumed?

A. I don't know about that.

Q. Would the fact that other drugs . . . uppers, ampheta-mines were consumed simultaneously with the PCP have any bearing on that?

A. I don't know.

Q. Would the fact that alcohol was present have any bearing on that?

A. I am not sure about the combination.

Q. What I am asking is, would the combination of stimulants . . . uppers . . . alcohol, which is a depressant, I understand . . .

A. Yes.

Q. . . . marijuana, in which the drug THC is present, and PCP . . . angel dust . . . a combination of all four of these drugs, would they bring on a psychotic state?

A. Quite likely.

Q. Would it be probable that they would?

A. Yes.

Q. A person while engaged in a trip of this sort, or an episode of this sort, would they have control over their inhibitions?

A. I doubt it.

Q. Would they be susceptible to motivation by others or outside stimuli?

A. I would think so.

Q. In the case here at hand, based on your interview of this patient, you do not think that was the case?

A. No. At least when I saw him, he was able to recall all events that went on.

Q. Doctor, do you recall the date of the offense for which this patient was charged?

A. Not right off . . . I did at the time.

Q. If I told you it was November 10, 1978, and that you interviewed him in April of 1979, do you think this person could have acquired some of the knowledge of the incident for which he was charged?

A. It is possible if he was told.

Q. Would a person that had been on a trip like that . . . and even though you said he would have limited recall of what actually happened . . . they may think they knew what happened, but they would have limited recall of the actual happenings?

A. Yes.

Q. Would this person be receptive to suggestions or discussions or facts which were brought to his attention after the facts?

A. He may feel like he would recall after he was aware of what had gone on.

Q. In other words, after he was-exposed to the actual facts, even though actually he was not aware of them at the time they happened, then there is a possibility he could recall these instances the same as if he know [sic] they happened on the occasion?

A. Yes.

Q. Would the person's IQ have any bearings [sic] upon the receptiveness to being made aware of these facts?

A. I think possibly more suggestive.

Q. What does a Verbal IQ of 83 indicate to you?

A. That is low average, or border line.

Q. Border line to what?

A. Low normal or border line. I would think the normal would be 90 to 110.

Q. And a performance IQ of 88?

A. That is about the same thing.

Q. And a Full Scale IQ of 84?

A. Low normal or border line.

Q. What is a Verbal IQ?

A. Language, reading, writing, speaking as opposed to hand writing, manipulation with the hand.

Q. And Performance would be manual?

A. Yes.

Q. Is that the reactions to instructions . . . Performance IQ, does that mean . . . what does that mean?

A. You would do better to ask a psychologist about it . . . but it is mostly assembling things, abstractions, and this kind of thing.

Q. And a Full Scale IQ?

A. That is the verbal plus the performance.

Q. So, the full scale would be an aggregate of the others?

A. Yes.

Q. If a person was reflected to you as having a Full Scale IQ of 84, a twenty-six year old man, for instance, that would indicate to you a low normal?

A. Low normal or border line.

Q. Would the combination of drugs which we have talked about and this Full Scale IQ, would that make that person more receptive to motivation and commands by other persons or other stimuli?

A. I would think it probably would.

Q. As you said earlier, you think this person might be more receptive to being made known of the facts after they actually occurred, than others?

A. Perhaps. I think anybody might think they recall if they heard somebody tell what went on.

Q. What I am saying is, in this case that we have here, assuming that Patient Jones had consumed a quantity of marijuana cigarettes, sprinkled with PCP, a pint of rum, and other drugs . . . stimulants, this together with a Full Scale IQ of 84, is it probable that this person could have had a bad trip on these drugs?

A. I would think so.

Q. Is it, also, probable that the facts of what happened on that bad trip, after being repeated constantly for a period of months, would suddenly merge into him as being the truth and he could recall it?

A. It would be quite suggestive.

Q. Would it be probable in this case?

A. Perhaps.

Q. Is it your opinion that is probably what happened in this case?

A. He was able to recall so well, there was no doubt in my mind that he knew what was going on.

Q. Is it probable that he was merely repeating what had been told to him over a period of several months after being indicted and charged with a crime which had been not unattended with a great deal of publicity and speculation.

A. It is possible.

Q. I believe you said earlier that it would be very likely that that would be probable? If he had had all those things?

A. Yes, if he had had all those things.

* * * *